Supreme Court, U.S.
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No. 94 -

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

JOAN BACON,

Petitioner,

—v.—

EILEEN WILSON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MINNESOTA COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

CAROL A. PETERSON
Dorsey & Whitney
Pillsbury Center South
220 South Sixth Street
Minneapolis, MN 55402
(612) 340-7837

JOHN C. GRAY, JR.
(*Counsel of Record*)
ANDREW DWYER
MATTHEW BRINCKERHOFF
Brooklyn Legal Services
Corp. B
105 Court Street
Brooklyn, NY 11201
(718) 237-5500

Attorneys for Petitioner

QUESTIONS PRESENTED

The Parental Kidnaping Prevention Act of 1980 ("PKPA"), 28 U.S.C. § 1738A, *inter alia*, establishes uniform national standards under which State courts must determine their jurisdiction to decide interstate child custody disputes. Section 1738A(g) provides that a State court "shall not exercise jurisdiction" in any custody proceeding "commenced during the pendency of a proceeding in a court of another State" when the other State court has jurisdiction consistent with the PKPA. Section 1738A(c) further provides that if a State has jurisdiction under the PKPA as the child's "home State," no other State may exercise jurisdiction under the PKPA except when the child has been abandoned or "it is necessary in an emergency to protect the child because he [or she] has been subjected to or threatened with mistreatment or abuse."

The questions presented are:

1. Under the PKPA, when a custody proceeding is first commenced in the child's "home State," does the "home State" forfeit jurisdiction with the result that another State may exercise jurisdiction in a later commenced proceeding, solely because the "home State" issued an *ex parte* temporary custody order?

2. Under the PKPA, when a State has jurisdiction as the child's "home State," may another State exercise jurisdiction over the custody dispute based solely on an attorney's conclusory claim of abuse, where there is no evidence in the record to support that claim and no evidence of a present emergency based on actual or threatened mistreatment or abuse of the child?

PARTIES TO THE PROCEEDING

The parties to the instant proceeding are set forth in the caption on the cover of this petition. The proceeding involves an interstate custody dispute. The child who is the subject of the dispute is identified in the proceedings below as Talassa Bacon.

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PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA COURT OF APPEALS

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and decision of the Minnesota Court of Appeals entered on February 22, 1994.

OPINIONS BELOW

The opinion of the Minnesota Court of Appeals has not been reported. It is reprinted in the Appendix hereto. 1a-5a. The memorandum order and decision of the Minnesota District Court for the First Judicial District (Spicer, J.) has not been reported. It is reprinted in the Appendix hereto. 6a-12a.

JURISDICTION

The judgment of the Minnesota Court of Appeals was entered on February 22, 1994, affirming the denial of petitioner's motion to dismiss the proceeding for lack of jurisdiction. 1a. On April 19, 1994, the Minnesota Supreme Court denied a petition for further review. 22a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

STATUTORY PROVISIONS INVOLVED

Parental Kidnaping Prevention Act of 1980, Pub. L. No. 96-611, 94 Stat. 3566, *codified at* 28 U.S.C. § 1738A. 23a-27a.

STATEMENT OF THE CASE

A. Introduction.

This interstate child custody dispute raises important federal questions regarding the proper interpretation of the Parental Kidnaping Prevention Act of 1980 ("PKPA"). The Minnesota Court of Appeals below decided these questions in square conflict with the decisions of many other States. These substantial conflicts in the States' interpretation of the PKPA have persisted for several years and, as a number of decisions within the past few years demonstrate, these conflicts remain current and show

no sign of being resolved. Given the significant number of cases raising these issues, the conflicts among the States' interpretation of the PKPA seriously threaten the statute's central goal of establishing uniform national jurisdictional standards and avoiding jurisdictional competition and conflict between State courts in interstate custody disputes.

In the thirteen years since Congress enacted the PKPA, this Court has not yet interpreted the statute, other than to find that it creates no federal cause of action. *See Thompson v. Thompson*, 484 U.S. 174 (1988). Because the conflicts in the States' interpretation of the PKPA are squarely presented here, this case provides this Court with an opportunity to resolve these questions and thereby maintain uniform national jurisdictional standards in interstate custody disputes.

B. Factual Background.[1]

Talassa Bacon-Williams, the eldest daughter of petitioner Joan Bacon and Thomas J. Williams, 28a, 53a,[2] lived

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[1] The factual background presented here is based on the Transcript of Proceedings held on August 18, 1993, in the Minnesota District Court, *see* 53a-61a, and on the Affidavit of Joan Bacon (dated October 12, 1993), with annexed exhibits, filed in the Minnesota District Court in support of petitioner's motion to dismiss for lack of jurisdiction. 28a-52a. No other evidence was submitted to or taken in the trial court.

Oral argument was heard on November 1, 1993, but no evidence was submitted, and no other evidentiary hearing was held. Although respondent's *attorney* submitted an affidavit to the trial court, respondent herself did not. Respondent did submit affidavits in the Court of Appeals, but that court held that they would not be considered in deciding the appeal. 19a. The child has not submitted an affidavit in this case; nor did respondent or the child's attorney submit affidavits from other witnesses or any documentary evidence to the trial court.

[2] Although they have been living together continuously since May, (continued...)

continuously with her parents and four siblings in Brooklyn, New York, from June, 1990, up until July, 1993, 31a, 33a, 36a, 55a, although she previously lived portions of her life with respondent Eileen Wilson (her maternal grandmother).[3] As of July, 1993, no proceeding affecting custody had ever been initiated anywhere concerning Talassa.

In July, 1993, Talassa's parents sent her and three of her siblings for a three week vacation to visit their Aunt (petitioner's sister), Amanda Brown, in Minnesota. All four children were to return on August 4th. 33a, 53a-54a. Instead of staying with Ms. Brown, however, without petitioner's consent, Talassa and the other children were sent to stay with respondent, who also lives in Minnesota. 34a, 53a. On August 4th, petitioner went to pick up her four children at the airport, but only three got off the plane. Talassa was not there. Without petitioner's consent -- indeed, without any advance warning -- respondent had retained

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[2] (...continued)
1985, petitioner and Mr. Williams are not married. 28a, 30a. Respondent alleges that Mr. Williams is not Talassa's father, and that her last name is Bacon, not Bacon-Williams. *See, e.g.*, Respondent's Brief and Appendix, at 7 (Dec. 20, 1993), *filed in In Re the Custody of: T.B.*, No. C7-93-2263 (Minn. Ct. App.) [hereinafter "Resp. App. Br."]. However, respondent has never offered a scintilla of evidence to support this claim, nor has any other person come forward as Talassa's father. Petitioner and Mr. Williams both state that Mr. Williams is Talassa's father, 28a, 53a; Mr. Williams has been adjudged as Talassa's father in a paternity action in New York, *see* Order of Filiation in *Williams v. Bacon*, No. P-09217/93 (N.Y. Fam. Ct. Nov. 10, 1993); and Talassa's birth certificate states that her last name is Bacon-Williams. *See* Transcript of Proceedings, at 24-28 (Aug. 18, 1993), in *In the Matter of the Welfare of: Talassa Bacon-Williams* (Minn. Dist. Ct.) [hereinafter "Tr."]. Mr. Williams is the father of petitioner's four other children as well. 28a.

[3] As of the proceeding's commencement below, other than one year spent in Nicaragua as a small child, Talassa's life had been spent roughly evenly divided between living with petitioner in New York and living with respondent in Minnesota. 6a-7a, 29a-33a.

Talassa in Minnesota. 34a, 54a.

The next day, petitioner and Mr. Williams drove to Minnesota, arriving on August 6th. They went to respondent's house, but no one was there. Mr. Williams returned to New York on August 7th, but petitioner remained. On August 8th, respondent returned to her house, but without Talassa. Acting on the advice of her attorney, respondent refused to tell petitioner the address or telephone number where Talassa could be reached. Petitioner met with respondent's attorney on August 10th, but he also refused to tell petitioner the whereabouts of her daughter. Respondent and her attorney thus hid Talassa from her mother throughout her stay in Minnesota until, on August 12th, petitioner returned to New York. 34a-35a, 58a-59a.

C. Petitioner's New York Action.

On August 13th, proceeding *pro se*, petitioner commenced an action for Talassa's custody in the New York State Family Court. 35a. In her petition for custody and supporting affidavit, petitioner accurately alleged that Talassa had lived with her and Mr. Williams in New York from 1990 until July, 1993, when she was sent on the vacation to Minnesota. 40a-41a, 42a-43a. Petitioner also alleged accurately that respondent had kept Talassa in Minnesota against petitioner's wishes, and that when petitioner went to respondent's house to retrieve Talassa, respondent hid Talassa and refused to divulge her whereabouts. 40a-41a. Finally, petitioner accurately alleged that no other custody proceeding was pending anywhere concerning Talassa. 40a, 43a.

On that same day, the Honorable Maureen A. McLeod, Judge of the New York Family Court, entered an *ex parte* order awarding temporary custody of Talassa to petitioner. Judge McLeod adjourned the matter to August 25, 1993. 45a-46a.

D. Action Of The Minnesota Court.

Armed with the New York temporary custody order, petitioner and Mr. Williams again drove to Minnesota. 35a.

The petition and temporary custody order were served personally on respondent's attorney on August 16th. 44a, 57a. Petitioner's attempt to enforce the New York order with the assistance of the local police failed, however. Faced with this dilemma, Mr. Williams contacted the local court to obtain enforcement of the New York order. On August 17th, the Honorable William J. Thuet, Judge of the Minnesota District Court, First Judicial District, *sua sponte* issued an *ex parte* order awarding temporary custody of Talassa to the Dakota County, Minnesota, Community Services Department and scheduled a proceeding for the next day. 13a, 35a, 53a-55a. At this time there was no custody petition pending in Minnesota. 55a, 59a.

On August 18th, petitioner and Mr. Williams appeared *pro se* before Judge Thuet. Respondent also appeared, represented by her attorney, as did Talassa, represented by an attorney appointed by the court. 53a.[4]

No witnesses were sworn at the hearing and, except for the New York temporary custody order, 55a, no documentary evidence was presented to the court. However, petitioner and Mr. Williams addressed the court extensively, as did the attorneys for respondent and for Talassa. Respondent spoke only briefly, and Talassa neither spoke on the record nor with Judge Thuet *in camera*. 60a. No other witnesses spoke that day.

The court and the parties were apprised of the pending New York custody proceeding. Respondent's attorney complained that respondent herself had not been personally served with the New York petition for custody, but he admitted that he had been served with the petition, and respondent has never disputed that she received actual notice of the New York custody proceeding. Indeed, on the record during the August 18th Minnesota

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[4] Talassa's attorney was *not* appointed as a guardian *ad litem*. *See* Transcript of Proceedings, at 2-3 (Nov. 1, 1993), in *In Re the Custody of: Talassa Bacon*, No. FX-93-9068 (Minn. Dist. Ct.) [hereinafter "Oral Arg."].

proceeding, petitioner specifically advised the court and the other parties of the New York action, and that a hearing was set in New York on August 25th. 57a.

Since it was undisputed that Talassa had lived with her family in New York continuously for the prior three years, *see, e.g.*, 55a, 56a, Judge Thuet repeatedly stated that New York would have jurisdiction over the custody dispute as Talassa's "home State" under the Uniform Child Custody Jurisdiction Act ("UCCJA"), *codified as* N.Y. Dom. Rel. Law § 75-a *et seq.* and Minn. Stat. Ann. § 518A.01 *et seq.* *See, e.g.*, 56a, 58a, 59a. Noting that a custody proceeding was already pending in New York, while there was still no custody proceeding pending in Minnesota, Judge Thuet remarked, "You can't run two custody proceedings in two different states at the same time." 59a.

But the attorneys for respondent and Talassa argued that Minnesota should assert jurisdiction over the dispute because, they claimed, Talassa had been subject to abuse by Mr. Williams in New York. Specifically, the attorneys claimed Mr. Williams once had slapped Talassa and had threatened her with abuse unless she "act[ed] in the way she was told to act." 55a-56a.

As to the former claim, petitioner admitted that once, *in 1991*, Mr. Williams had slapped Talassa, Talassa suffered a nose bleed and petitioner and Mr. Williams took her to a local hospital for medical care. 35a, 56a. As a result, a routine child abuse investigation by the New York Department of Social Services was triggered. After a six month investigation, the New York State Department of Social Services found that *no abuse had occurred*. 35a-36a, 47a-48a, 56a, 59a.[5] This is the only claim

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[5] Respondent's counsel has claimed that New York State found no abuse had occurred only because Talassa was coerced into "recanting" her allegations of abuse. *See, e.g.*, Tr. at 11-12. But respondent has never come forward with a shred of evidence to support this claim -- not even a conclusory statement from Talassa. As petitioner explained in her

(continued...)

of any physical injury as to which any evidence whatsoever was provided.[6]

As to the claim that Mr. Williams had verbally threatened Talassa, no evidence was ever submitted to the trial court to show that such a threat had occurred. Although respondent's attorney and Talassa's attorney made this claim in oral argument and in their briefs, *see, e.g.*, 56a, neither Talassa nor respondent ever provided the trial court with any statement (sworn or unsworn) that such a threat occurred. Talassa's attorney conceded that there was no allegation that petitioner had ever abused or threatened to abuse Talassa in any way. 58a. Nor, concededly, is there any allegation of abuse regarding petitioner's other four children. 57a.

The court recessed to allow the parties to attempt to settle the matter. When this failed, Judge Thuet held an *ex parte*, off the record discussion with Talassa's attorney. 60a. Petitioner does not know what occurred during this discussion, but despite having stated several times that the matter should be tried in New York, when Judge Thuet called court back into session he stated:

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[5] (...continued)
affidavit filed with the Minnesota trial court, the New York investigation was triggered as a routine matter because Talassa was treated at a hospital, *not* because Talassa made any allegations of abuse. "Talassa did not 'recant' her allegations of abuse quite simply because there was nothing to recant." 36a.

[6] At the August 18th proceeding, Talassa's attorney, appearing to misspeak, initially claimed Talassa had been choked, but then appeared to retract this allegation immediately, 55a, and Talassa's attorney has never raised this allegation again. Petitioner denied any allegation of choking. 56a. Respondent's attorney apparently still maintains that Talassa was choked (and even hospitalized as a result). *See, e.g.*, Resp. App. Br., at 4-5. But as with the other allegations, neither respondent nor Talassa's attorney has ever come forward with any evidence that any such choking occurred -- not even a conclusory statement from Talassa or respondent.

> My head tells me that this case ought to go back to New York because that is where the best evidence is and that is where this case is going to be tried, it ought to be tried in New York. That is what my head tells me. But my heart tells me that, that there is some valid concerns on the safety and welfare of this child. And, that perhaps, you know, she should remain living here in the State of Minnesota.
>
> To be honest with everyone here, I have never been to New York and I really have no desire to go to New York because I am afraid of big cities, although I like Chicago, but I watch TV I guess. I just th[a]nk God every day that I don't live in New York City. Maybe that is a prejudice I have that is in my heart, I don't know but it is a dog-eat-dog world and there is no such thing as "Minnesota nice" in New York City.

61a. Judge Thuet reserved decision.

The next day, August 19th, Judge Thuet awarded temporary custody to respondent, on the condition that she file a custody petition within the next twenty-four hours, and prohibited Talassa from leaving Minnesota without leave of the court. 13a-14a. Still in effect today as the only order awarding custody of Talassa to respondent, this "temporary" custody determination was thus made *before* any Minnesota custody petition was filed or served.

Later that same day, respondent's attorney served on petitioner a petition for Talassa's custody.[7] Quoting verbatim Minnesota's UCCJA, *see* Minn. Stat. Ann. § 518A.03(1)(c)(2), the petition conclusorily alleged that "it is necessary in an emergency to protect the child because the child has been subjected to or threatened with mistreatment or abuse and is otherwise neglected or dependent," but it did not specifically identify *any* alleged incident of abuse. 62a-66a.

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[7] Mr. Williams was not named in the petition and has never been served with the petition.

Despite receiving actual notice of the August 25th hearing scheduled in the New York custody proceeding, respondent did not appear, nor has she ever appeared in the New York action. The New York court has scheduled several return dates since that time, and has reaffirmed its temporary custody award to petitioner in a series of orders. The New York proceeding is still pending, presently returnable on October 3, 1994.

E. The Federal Questions Presented Were Properly And Timely Raised In The State Courts Below.

Petitioner timely answered respondent's custody petition, specifically raising as a defense that the Minnesota court lacked jurisdiction under the Parental Kidnaping Prevention Act of 1980, 28 U.S.C. § 1738A ("PKPA"), 67a, and simultaneously moved to dismiss the Minnesota proceeding on that basis. Petitioner argued that Minnesota lacked jurisdiction under the PKPA because a custody proceeding was already pending in New York when the Minnesota proceeding was commenced, and New York had jurisdiction under the PKPA as Talassa's "home State." *See* 28 U.S.C. § 1738A(c)(2)(A). Therefore, Minnesota was barred from exercising jurisdiction, because under the PKPA: "A court of a State *shall not exercise jurisdiction* in any proceeding for a custody determination commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising jurisdiction consistently with the provisions of this section to make a custody determination." 28 U.S.C. § 1738A(g) (emphasis added). *See* Memorandum in Support of Motion to Dismiss for Lack of Jurisdiction, at 5-6 (Oct. 13, 1993), *filed in In Re the Custody of: Talassa Bacon*, No. FX-93-9068 (Minn. Dist. Ct.) [hereinafter "Pet. Trial Mem."].

Petitioner further argued that "There is no Basis for 'Emergency' Jurisdiction" because respondent alleged, at most, only a single incident of *past* "abuse" (found *not* to be abuse by New York State), but there was "no allegation of any *present* danger to Talassa, and . . . absolutely no factual support for such

an allegation." Pet. Trial Mem., at 8 (emphasis added).[8]

The Minnesota District Court denied the motion to dismiss. The trial court found that Talassa had lived in New York for the last three years, 6a-7a, thereby giving New York jurisdiction as Talassa's "home State." *See also* 10a ("Minnesota is obviously not the home state of the child"). *See* 28 U.S.C. § 1738A(c)(2)(A). Moreover, the court agreed that "there is a proceeding in a New York Court." 8a. Nonetheless, the trial court held that Section 1738A(g) did not prevent Minnesota from exercising jurisdiction over the custody proceeding subsequently filed there, because the entry of the *ex parte* order in New York meant that New York was "not exercising jurisdiction consistently with" the PKPA and, therefore, New York had lost jurisdiction. 8a-9a.

The court also found that it had emergency jurisdiction over the dispute based on the claim that Talassa "has been physically

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[8] Talassa's attorney submitted no written response to the motion to dismiss. Respondent's *attorney* submitted an affidavit in the trial court, but neither respondent, Talassa nor any other knowledgable witness submitted any affidavit in the trial court to contest petitioner's affidavit in support of her motion to dismiss. Nor did respondent point to any evidence in the record of a present danger to Talassa that would support the exercise of emergency jurisdiction.

At oral argument on the motion to dismiss, respondent's attorney claimed that "a home study was done, and I believe that should be in the file; the results of the home study. I don't know how that applies to jurisdiction exactly." Oral Arg., at 24. In response, the trial judge said that regardless of whether the results of a home study were "in the file," "[f]rankly, I won't consider that at this time." *Id.* Neither respondent nor Talassa's attorney ever offered into evidence in the trial court the results of any home study. On appeal, respondent's attorney submitted an affidavit to which he attached a copy of a home study report. *See* Affidavit of Respondent's Attorney, ¶ 6 & Exhibit 1 (Nov. 22, 1993), *filed in In Re the Custody of: T.B.*, No. C7-93-2263 (Minn. Ct. App.). But the Court of Appeals ruled that this material would "not be considered in deciding this appeal on the merits." 19a.

abused by Mr. Williams and [that he] has threatened further physical abuse upon her unless 'she shapes up.'" 7a, 11a. The trial court cited *no evidence* in the record to support this claim, not even a conclusory allegation by Talassa.[9]

Petitioner timely appealed,[10] challenging the trial court's holding that it had jurisdiction under the PKPA. *See* Brief of Appellant Joan Bacon, at 1 (Nov. 24, 1993), *filed in In Re Custody of: T.B.*, No. C7-93-2263 (Minn. Ct. App.) [hereinafter "Pet. App. Br."]. Petitioner again argued that 28 U.S.C. § 1738A(g) barred Minnesota from exercising jurisdiction, because when the Minnesota proceeding was commenced the New York custody proceeding was already pending, and New York has jurisdiction as Talassa's "home State." Pet. App. Br., at 6-7. Petitioner argued that the lack of notice prior to the entry of the *ex parte* order only affected "whether the New York order was entitled to full faith and credit," and that "issue was not before the Court." *Id.* at 8. Rather, petitioner argued, regardless of the *ex parte* order, the New York proceeding was pending when the Minnesota action was commenced, New York has jurisdiction as the "home State," and therefore, under the PKPA, Minnesota was prohibited from exercising jurisdiction. *Id.* at 8-10.

Further, petitioner again pointed out that aside from a single claim of *past* conduct, there "is simply no evidence in the record to support an exercise of emergency jurisdiction by the district court." *Id.* at 10-11. Specifically with regard to the attorneys'

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[9] The court also asserted "best interest" jurisdiction based on Talassa's connection with the State and the purported availability of evidence in Minnesota concerning the dispute. 7a, 10a-11a. The trial court failed to observe that under the PKPA "best interest" jurisdiction exists *only* if it appears no other State would have jurisdiction as the child's "home State." 28 U.S.C. § 1738A(c)(2)(B)(i). *But see infra* at 12 n.12.

[10] *See Nazar v. Nazar*, 505 N.W.2d 628, 632-33 (Minn. Ct. App. 1993) (if party does not appeal when court asserts jurisdiction over custody petition and waits until final custody decree is entered, order asserting jurisdiction will be deemed final and unappealable).

claim that "Talassa had been threatened with future abuse if she did not 'shape up,'" petitioner pointed out that "there was no evidence, either by affidavit or testimony, to corroborate this." *Id.* at 11 n.4.[11]

The Minnesota Court of Appeals affirmed. Following *In re Marriage of Schmidt*, 436 N.W.2d 99 (Minn. 1989), and *Snow v. Snow*, 369 N.W.2d 581 (Minn. Ct. App. 1985), the court held that the pending New York proceeding did not preclude Minnesota's exercise of jurisdiction, even though New York has jurisdiction as the "home State," *see* 3a, solely because the New York court had entered an *ex parte* order. 3a-4a.

As to emergency jurisdiction, while acknowledging that the "alleged incidents of physical injury are not recent," the Court of Appeals nonetheless held that "the allegation of a recent specific threat supports the claim of emergency jurisdiction." 3a. The Court of Appeals ignored petitioner's argument that no evidence in the record supported this claim of threatened abuse.[12]

Petitioner timely sought discretionary review by the Minnesota Supreme Court, again challenging Minnesota's jurisdiction under the PKPA. *See* Petition for Review of Decision of Court of Appeals, at 1 (Mar. 24, 1994), *filed in In Re Custody of: T.B.*, No. C7-93-2263 (Minn.). Again, petitioner argued that the pending New York proceeding prevented Minnesota from exercising jurisdiction under 28 U.S.C. § 1738A(g). *Id.* at 3-5. Moreover, petitioner argued, there was no basis for emergency jurisdiction based on claims of *past* incidents and "unsubstantiated allegations by an attorney as to

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[11] Petitioner also pointed out that under the PKPA, 28 U.S.C. § 1738A(c)(2)(B)(i), there can be no "best interest" jurisdiction unless there is no "home State." Pet. App. Mem., at 7 n.2.

[12] As to "best interest" jurisdiction, the Court of Appeals "recognize[d] that under the PKPA, 'best interest' jurisdiction applies only if no state has 'home state' jurisdiction over a child." 3a.

future threats." *Id.* at 4. On April 19, 1994, the Minnesota Supreme Court denied the petition for review. 22a.

F. The Decision Below Is A Final Judgment Reviewable Under 28 U.S.C. § 1257.

Under 28 U.S.C. § 1257, this Court's review of State court decisions is available only with respect to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had."[13] Generally, to be reviewable the State court judgment must "be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein." *Market R. Co. v. Railroad Commission*, 324 U.S. 548, 551 (1945). Nonetheless applying a "practical rather than a technical construction" to the finality requirement, *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 546 (1949), this Court has found finality where the federal issues have been finally decided, the remaining State court proceedings involve only collateral, non-federal issues, "reversal . . . on the federal issue would be preclusive of any further litigation on the relevant cause of action," and "refusal immediately to review the state-court decision might seriously erode federal policy." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 482-83 (1975).

In *Mercantile National Bank v. Langdeau*, 371 U.S. 555, 557-58 (1963), for example, this Court reviewed a Texas Supreme Court order that had improperly interpreted a federal statute dealing with the venue of suits against national banks, and had remanded the case for trial on the merits at a venue established by State law. This Court held the order was "a

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[13] Because petitioner properly sought and was denied the Minnesota Supreme Court's discretionary review, 22a, the judgment below is reviewable under § 1257 as being "rendered by the highest court of a State in which a decision could be had." *See, e.g., Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 678 n.1 (1968); *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 160 (1954); *Hammerstein v. Superior Court*, 341 U.S. 491, 492 (1951).

separate and independent matter, anterior to the merits" and that "it serves the policy underlying the requirement of finality in 28 U.S.C. § 1257 to determine now in which state court appellants may be tried rather than subject them, and appellee, to long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed until the conclusion of the proceedings." *Id.*[14]

Langdeau is controlling here. First, the federal issue -- whether Minnesota has jurisdiction under the PKPA to decide this interstate custody dispute -- has been finally decided by the Minnesota Court of Appeals and is completely "separate and independent" from the remaining State law issues. Second, reversal on the question of jurisdiction under the PKPA would be dispositive, precluding any further litigation in the Minnesota courts. Third, refusing to review immediately the Minnesota court's decision, thereby forcing petitioner to litigate the custody dispute in Minnesota contrary to the PKPA,[15] would completely negate the statute's important federal policies: to "establish national standards under which the [State] courts . . . will determine their jurisdiction to decide [custody] disputes," and to "avoid jurisdictional competition and conflict between State courts in matters of child custody and visitation . . . ." 24a. *See infra* at 15-18.

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[14] *See also Belknap, Inc. v. Hale*, 463 U.S. 491, 497-98 n.5 (1983) (holding final State court determination that State causes of action were not preempted by federal law and that trial should proceed in State trial court); *American Motorists Insurance Co. v. Starnes*, 425 U.S. 637, 642 n.3 (1976) (treating as final Texas judgment holding that State venue statute was not unconstitutionally discriminatory); *Harris v. Washington*, 404 U.S. 55, 56 (1971) (holding final State court judgment rejecting claim that double jeopardy prohibited second criminal trial).

[15] *Cf. Shaffer v. Heitner*, 433 U.S. 186, 195 n.12 (1977) (treating as final State court ruling denying motion to quash service and vacate sequestration order, because otherwise defendant faced a choice of "suffering a default judgment or entering a general appearance and defending on the merits").

Because the jurisdictional issues raised below typically are finally resolved in initial interlocutory orders, it is unlikely that these questions will ever be presented in a posture different than this case. As in *Langdeau*, the finality requirement is best served by determining *now* in which State this custody dispute should be litigated, rather than subjecting the parties to lengthy proceedings "which may all be for naught."[16]

REASONS FOR GRANTING THE WRIT

THE MINNESOTA COURT DECIDED IMPORTANT QUESTIONS OF FEDERAL LAW IN CONFLICT WITH THE DECISIONS OF SEVERAL OTHER STATES

A. This Court's Authoritative Interpretation Of The Parental Kidnaping Prevention Act Is Necessary To Maintain Uniform National Jurisdictional Standards In Interstate Custody Disputes And Thereby Fulfill The Purposes Of The Act.

Because custody orders "characteristically are subject to modification as required by the best interests of the child," *Thompson v. Thompson*, 484 U.S. 174, 180 (1988), historically doubt existed whether they were subject to full faith and credit requirements, *see Ford v. Ford*, 371 U.S. 187, 192 (1962), and State courts freely modified the custody orders of other States. *See New York ex rel. Halvey v. Halvey*, 330 U.S. 610, 614-15 (1947). Because jurisdiction to modify could be predicated on physical presence alone, this "state of the law . . . where possession is not merely nine points of the law but all of them,"

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[16] For practical purposes failure to grant review now may well dispose of petitioner's rights on the merits. *Cf. Construction Laborers v. Curry*, 371 U.S. 542, 550 (1963) (unless judgment below is reviewed now, petitioner "will . . . remain subject to the . . . temporary injunction . . . and must face further proceedings in the state courts which the state courts have no power to conduct. . . . The truth is that . . . a temporary injunction . . . may effectively dispose of petitioner's rights and render entirely illusory his right to review here . . .").

May v. Anderson, 345 U.S. 528, 539 (1953) (Jackson, J., dissenting), "contributed to widespread jurisdictional deadlocks like this one, and more importantly, to a national epidemic of parental kidnaping." *Thompson*, 484 U.S. at 180-81.

Several States tried to avoid these jurisdictional conflicts by adopting the Uniform Child Custody Jurisdiction Act, to provide their courts with uniform standards for determining custody jurisdiction. Despite widespread passage of the UCCJA, however,[17] this effort failed, because "states adopted variations of the UCCJA and state courts interpreted the uniform provisions differently." *Shute v. Shute*, 607 A.2d 890, 892 (Vt. 1992); *see also In re Clausen*, 502 N.W.2d 649, 655 (Mich.), *stay denied sub nom. DeBoer by Darrow v. DeBoer*, 114 S. Ct. 1 (1993); *Michalik v. Michalik*, 494 N.W.2d 391, 394 (Wis. 1993).[18]

"In the absence of uniform national standards for allocating and enforcing custody determinations," *Thompson*, 484 U.S. at 181, Congress found, contestants in custody disputes had every incentive to resort to self-help, including "the seizure, restraint, concealment, and interstate transportation of children." 23a. The PKPA's principal sponsors estimated there were 25,000 to 100,000 cases *each year* where contestants used self-help to gain possession in child custody disputes, and they expected these

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[17] As Congress was aware, 43 States had enacted the UCCJA prior to the PKPA's passage. *See Parental Kidnaping: Hearing on H.R. 1290 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 96th Cong., 2d Sess. 113 (1980) [hereinafter "*1980 House PKPA Hearing*"] (statement of Sen. Malcolm Wallop). The UCCJA has now been adopted by all 50 States and the District of Columbia. 9 U.L.A. 15-16 (pt. 1) (Supp. 1993).

[18] *See also Parental Kidnaping Prevention Act of 1979: Joint Hearing on S. 105 Before the Subcomm. on Criminal Justice of the Senate Comm. on the Judiciary and the Subcomm. on Child and Human Development of the Senate Comm. on Labor and Human Relations*, 96th Cong., 2d Sess. 144-45 (1980) [hereinafter "*1980 Joint PKPA Hearing*"] (statement of Prof. Russell Coombs).

numbers to increase. *See, e.g., 1980 Joint PKPA Hearing*, at 1, 5 (statements of Sens. Charles Mathias and Malcolm Wallop); *see also Thompson*, 484 U.S. at 181. Hearings recounted the "enormous" social costs of this problem, including emotional and financial harm to parents and psychological harm to children.[19]

Congress found the principal problem was that "the laws and practices by which the [State] courts . . . determine their jurisdiction to decide such disputes, and the effect to be given the decisions of such disputes by the courts of other jurisdictions, *are often inconsistent and conflicting*," thereby resulting in interstate jurisdictional deadlock. 23a (emphasis added).

Because the States could not resolve these conflicts, Congress sought "to *establish national standards* under which the [State] courts . . . will determine their jurisdiction to decide such disputes and the effect to be given by each such jurisdiction to such decisions by the courts of other such jurisdictions," 24a (emphasis added),[20] with primary jurisdiction in the child's "home State," defined as "the State in which, immediately preceding the time involved, the child lived . . . for at least six consecutive months." 28 U.S.C. § 1738A(b)(4).

As this case reveals, the very problems that led Congress to enact the PKPA thirteen years ago still plague interstate custody

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[19] *See, e.g., 1980 House PKPA Hearing*, at 2, 4, 112, 143-46 (statements of Rep. Charles Bennett, Sen. Malcolm Wallop and Lee Haller, M.D.); *1980 Joint PKPA Hearing*, at 2, 3, 5, 10-11, 17 (statements of Sens. Charles Mathias, Alan Cranston, Malcolm Wallop and Rep. Charles Bennett); *Parental Kidnaping, 1979: Hearing Before the Subcomm. on Child and Human Development of the Senate Comm. on Labor and Human Relations*, 96th Cong., 1st Sess. 1 (1979) [hereinafter "*1979 Senate PKPA Hearing*"] (statement of Sen. Alan Cranston).

[20] *See 1980 House PKPA Hearing*, at 112 (statement of Sen. Malcolm Wallop); *1980 Joint PKPA Hearing*, at 4, 7-8, 144-46 (statements of Sens. Alan Cranston, Malcolm Wallop and Prof. Russell Coombs).

disputes today, because varying interpretations of the federal statute have created conflicting jurisdictional standards among the different states, with predictable results.[21] Here, because Minnesota's interpretation of the PKPA's key provisions conflicts with the decisions of several other states, respondent snatched a child to gain custody in defiance of the child's "home State" jurisdiction. In this case review is critical to maintain uniform national jurisdictional standards and to salvage "one of the chief purposes of the PKPA . . . to 'avoid jurisdictional competition and conflict between State courts.'" *Thompson*, 484 U.S. at 177.

B. The Minnesota Court Of Appeals Interpreted The Parental Kidnaping Prevention Act In Conflict With The Decisions Of Several Other States.

1. Priority for first filed proceeding.

At the behest of the Justice Department, during its consideration of the PKPA Congress added Section 1738A(g), which establishes a rule for determining priority between different States to enter an initial decree, both to address problems that occur when a contestant uses self-help to abscond with a child *before* a custody decree is entered, and to resolve conflicts when more than one state has jurisdiction.[22] Then

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[21] Some state trial and appellate courts still resolve interstate custody disputes without any reference to the PKPA at all. *See, e.g., Purdie v. Smalls*, 359 S.E.2d 306 (S.C. Ct. App. 1987); *Hobbs v. Hobbs*, 508 So.2d 677 (Miss. 1987); *Houtchens v. Houtchens*, 488 A.2d 726 (R.I. 1985); *Cella v. Cella*, 671 S.W.2d 764 (Ark. Ct. App. 1984). *See also Matter of E.H.*, 612 N.E.2d 174, 185 n.15 (Ind. Ct. App.) (trial courts frequently act "without regard" for PKPA), *aff'd*, 624 N.E.2d 471 (Ind. 1993). *See generally* Lucy Cooper, *The Parental Kidnaping Prevention Act (PKPA) of 1980 -- The Most Often Ignored Law in Family Court*, 11 Wis. J. Fam. L. 10 (1991).

[22] *See, e.g., Legislation to Revise and Recodify Federal Criminal Laws: Hearings on H.R. 6869 Before the Subcomm. on Criminal Justice of the* (continued...)

Assistant Attorney General Patricia Wald explained:

> It is possible under section 1738A(c) . . . for two states at once to have jurisdiction to make an initial child custody determination. It therefore could happen that after a state A proceeding was instituted *but before the state A court could give "reasonable notice and opportunity to be heard" and make a temporary order*, a state B court could be asked by an absconding parent to exercise its jurisdiction. In order to prevent such an exercise of jurisdiction, the revised proposal includes this new subsection (g) of section 1738A . . . .

1979 Senate Code Hearings, at 10634 n.3 (emphasis added). Thus, § 1738A(g) gives priority to the first *filed* action, even though no custody decree has been entered and no notice has been given to other parties. *Id.* at 10630-31 (Section 1738A(g) "prevents a second state from exercising jurisdiction over custody of a child as to whom a custody proceeding has been *filed*, but has not yet resulted in an order, in another state") (emphasis added); *1977-78 House Code Hearings*, at 1009 (statement of Russell Coombs, Dep. Chief Counsel, Sen. Judiciary Comm.).

In the courts below, respondent argued that even though her attorney was personally served with petitioner's New York custody petition and respondent had actual notice of the New York proceeding *before* any proceedings were commenced in Minnesota, 57a, the Minnesota court was not required to defer to the first filed New York proceeding because respondent allegedly

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[22] (...continued)
House Comm. on the Judiciary, 95th Cong., 1st & 2d Sess. 1004 & n.17, 1009 (1977-78) [hereinafter "*1977-1978 House Code Hearings*"] (statement of Russell Coombs, Dep. Chief Counsel, Sen. Judiciary Comm.); *1980 House PKPA Hearing*, at 112, 113 (statement of Sen. Wallop); *Reform of the Federal Criminal Laws: Hearings on S. 1722 and S. 1723 Before the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 10630-31, 10634 n.3 (1979) [hereinafter "*1979 Senate Code Hearings*"] (letter from Assistant Attorney General Patricia Wald to Rep. Peter Rodino).

was not properly served under New York law, and therefore the New York action supposedly was never commenced. *See, e.g.*, Resp. App. Br., at 11-15.

The PKPA, however, does not impose any particular service requirements; it only provides that contestants be given "reasonable notice and opportunity to be heard." 28 U.S.C. § 1738A(e). *See* Russell Coombs, *Interstate Child Custody: Jurisdiction, Recognition, and Enforcement*, 66 Minn. L. Rev. 711, 766 (1982); *cf. Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950). In this case, before the Minnesota petition was filed, respondent received actual notice of the New York proceeding, which is all the PKPA requires.[23] Indeed, to require more would defeat respondent's own position, for the Minnesota District Court entered *two* temporary custody orders, *see* 13a, 54a-55a, before any custody petition was filed, much less served, in the Minnesota proceeding.[24]

But more importantly, as the legislative history shows, § 1738A(g) prevents another court from exercising jurisdiction as soon as the first action is filed or commenced, *even if no notice is provided*. As virtually every State to address the issue has held, for purposes of § 1738A(g) an action is pending -- and

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[23] *See, e.g., Garrett v. Garrett*, 732 S.W.2d 127, 129-30 (Ark. 1987) (service on contestant's father was "reasonably calculated to give actual notice" and therefore satisfied PKPA); *Ingram v. Ingram*, 463 So.2d 932, 936-37 (La. Ct. App. 1985) (service on contestant's mother and attorney satisfied PKPA, where he had actual notice of custody proceeding). Courts similarly hold that actual notice satisfies the UCCJA's notice requirements. *See, e.g., Hurtado v. Hurtado*, 541 A.2d 873, 878-79 (Conn. App. Ct. 1988); *Vause v. Vause*, 409 N.W.2d 412, 414-15 (Wis. Ct. App. 1987); *Lemley v. Barr*, 343 S.E.2d 101, 106-07 (W. Va. 1986); *Spaulding v. Spaulding*, 460 A.2d 1360, 1364-65 (Me. 1983).

[24] To date Mr. Williams has not been served with the Minnesota petition even though he is Talassa's father and a "contestant" who "claims a right to custody." *See* 28 U.S.C. § 1738A(b)(2), (e).

takes priority over later proceedings -- as soon as it is filed, regardless of when -- or whether -- notice occurs.[25]

Thus, when the New York custody petition was filed, it barred Minnesota from exercising jurisdiction, as long as New York could "exercis[e] jurisdiction consistently with the provisions of this section to make a custody determination." 28 U.S.C. § 1738A(g). The PKPA provides that a court has jurisdiction to make a custody determination "consistent with the provisions of this section only if" the court "has jurisdiction

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[25] *See, e.g., Brown v. Brown*, 847 S.W.2d 496, 506-07 (Tenn. 1993); *Matter of C.A.D.*, 839 P.2d 165, 173 (Okla. 1992); *State ex rel. Griffin v. District Court*, 831 P.2d 233, 238-40 (Wyo. 1992); *In the Interest of A.E.H.*, 468 N.W.2d 190, 200, 203 (Wis.), *cert. denied sub nom. C.C. v. P.C.*, 112 S. Ct. 338 (1991); *Matter of B.B.R.*, 566 A.2d 1032, 1040-41 & n.25 (D.C. 1989); *Cunningham v. Cunningham*, 719 S.W.2d 224, 226-28 (Tex. Ct. App. 1986); *Elder v. Park*, 717 P.2d 1132, 1137-38 (N.M. Ct. App. 1986); *Owens, by and through, Mosley v. Huffman*, 481 So.2d 231, 235, 241, 242 (Miss. 1985); *Ex Parte Blanton*, 463 So.2d 162, 165 (Ala. 1985); *Ex Parte Lee*, 445 So.2d 287, 290 (Ala. Civ. App. 1983). Petitioner is aware of only one State that has taken the contrary view under the PKPA. *See Peterson v. Peterson*, 464 A.2d 202, 204-05 (Me. 1983).

Under the UCCJA's priority rule, States similarly hold that an action is commenced upon filing, and bars later proceedings, regardless of when notice is provided. *See, e.g., Scheafnocker v. Scheafnocker*, 514 A.2d 172, 173, 177-78 (Pa. Super. Ct. 1986); *In re Marriage of Brown*, 706 P.2d 116, 117, 119 (Mont. 1985); *St. Andrie v. St. Andrie*, 473 So.2d 140, 142, 144 (La. Ct. App. 1985); *Bonis v. Bonis*, 420 So.2d 104, 106-07 (Fla. Dist. Ct. App. 1982), *rev. denied*, 430 So.2d 450 (Fla. 1983); *In re Marriage of Weinstein*, 408 N.E.2d 952, 953, 957 (Ill. App. Ct. 1980); *Loper v. Superior*, 612 P.2d 65, 66-67 (Ariz. Ct. App. 1980); *Lopez v. District Court*, 606 P.2d 853, 855-56 (Colo. 1980); *Paltrow v. Paltrow*, 376 A.2d 1134, 1137 & n.3, 1139 (Md. Ct. Spec. App. 1977), *aff'd*, 388 A.2d 547 (Md. 1978).

Under New York law, an "action is commenced by filing," not service. N.Y. Civ. Prac. L. & R. § 304.

under the laws of such State" and the court satisfies one of the five jurisdictional requirements under the PKPA. 28 U.S.C. § 1738A(c); *see also Thompson*, 484 U.S. at 176; *Matter of B.B.R.*, 566 A.2d at 1037. It is undisputed that New York has jurisdiction as Talassa's "home State," both under New York's UCCJA[26] and under the PKPA. *See* 3a, 6a-7a, 10a, 56a, 58a, 59a; *see also* Resp. App. Br., at 18 ("New York is the home state of the child").[27] Therefore, the filing of the New York custody petition barred Minnesota from exercising jurisdiction.

Nonetheless, the Minnesota Court of Appeals held that because the New York court entered an *ex parte* temporary

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[26] In another version of the argument that the New York proceeding should not take priority because respondent supposedly was not properly served, Talassa's attorney argued below that service requirements should be bootstrapped onto the determination of whether New York has jurisdiction under the UCCJA. *See, e.g.*, Brief of Respondent T.B., at 17-18, *filed in In Re the Custody of: T.B.*, No. C7-93-2263 (Minn. Ct. App.). While "reasonable notice and opportunity to be heard" must be provided to contestants before a custody decree is made, *see* N.Y. Dom. Rel. Law § 75-e, New York's UCCJA flatly states that a court "*has jurisdiction* to make a child custody determination," as long as it meets one of four jurisdictional tests including, as in this case, "home State" jurisdiction. *See* N.Y. Dom. Rel. Law § 75-d(1) (emphasis added). Thus, New York "has jurisdiction" under its own law, *see* 28 U.S.C. § 1738A(c)(1), regardless of whether "reasonable notice" was provided before the temporary custody order was made. *See Spaulding v. Spaulding*, 460 A.2d 1360, 1364 (Me. 1983).

[27] Both statutes provide that a court has "home State" jurisdiction if it was the "home State" within six months before the proceeding was commenced. 28 U.S.C. § 1738A(c)(2)(A)(ii); N.Y. Dom. Rel. Law § 75-d(1)(a)(ii). Both statutes define "home State" as the State where just prior to the proceeding's commencement the child lived with her parents for at least six consecutive months. 28 U.S.C. § 1738A(b)(4); N.Y. Dom. Rel. Law § 75-c(5). The New York custody petition was filed on August 13, 1993. 35a. As of July, 1993, Talassa had lived with her parents in New York continuously for the prior three years. 31a, 33a, 36a.

custody order, it forfeited jurisdiction, and Minnesota could assert jurisdiction notwithstanding the prior proceeding in New York. 3a-4a (citing *In re Marriage of Schmidt*, 436 N.W.2d 99, 107 (Minn. 1989) (*ex parte* orders required trial court's jurisdiction to be "set aside"); *Snow v. Snow*, 369 N.W.2d 581, 583 (Minn. Ct. App. 1985) (even though proceedings were pending in the decree State, because the State subsequently entered an *ex parte* order it "no longer had jurisdiction")).[28]

Minnesota's holding directly conflicts with several other States that give priority to the first filed proceeding in a State that has jurisdiction under the PKPA, even if the initial court issues an *ex parte* custody order. The other States' decisions reveal that *ex parte* orders are issued frequently, for a variety of reasons, and while they may not always be entitled to interstate enforcement, their issuance does not forfeit jurisdiction.[29]

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[28] Of course, the Minnesota trial court below *also* entered an *ex parte* order on August 17th when Judge Thuet awarded temporary custody of Talassa to the Community Services Department, 54a-55a, and arguably Judge Thuet's August 19th order awarding temporary custody to respondent was also made without proper notice and opportunity to be heard, insofar as it was based on Judge Thuet's *ex parte* discussion with Talassa's attorney. *See* 60a.

[29] Congress was aware that "[s]ome states are very liberal in permitting ex parte temporary custody decrees," and was justifiably concerned about the adequacy of notice in custody proceedings. *1979 Senate PKPA Hearing*, at 63 (statement of Prof. Brigitte Bodenheimer); *id.* at 58 (letter from Sen. Alan Cranston to Prof. Brigitte Bodenheimer). But the legislative history also indicates Congress was aware that there were circumstances, such as when a party absconds with a child to another State, where a parent might legitimately obtain a temporary custody order "immediately." *1977-1978 House Code Hearings*, at 1004 (statement of Russell Coombs, Dep. Chief Counsel, Sen. Judiciary Comm.). Nothing in the legislative history suggests that Congress believed the entry of an *ex parte* order would cause a State to forfeit jurisdiction. Professor Bodenheimer, for example, while urging "that emphasis on notice and opportunity to be heard is called for in

(continued...)

For example, in *Matter of C.A.D.*, 839 P.2d 165, 168 (Okla. 1992), a Texas custody action was filed -- but not served -- and two days before a competing Oklahoma proceeding was filed, the Texas court issued a temporary *ex parte* order when one contestant absconded with the child. The Oklahoma Supreme Court held that because the Texas action was commenced first, § 1738A(g) "bar[red] the Oklahoma trial court from exercising jurisdiction." *Id.* at 170. The Oklahoma petitioner "contend[ed] the Texas court was not *exercising jurisdiction substantially in conformity with the Act when she filed the Oklahoma litigation because the Texas order was issued ex parte.* " *Id.* at 172 (emphasis in original). But the Oklahoma Supreme Court, expressly declining to follow *Snow v. Snow*, 369 N.W.2d 581 (Minn. Ct. App. 1985), held that the Texas proceeding was commenced upon filing, and Texas did not lose its jurisdiction by entering an *ex parte* order. *Matter of C.A.D.*, 839 P.2d at 172-73 & n.32. While holding that the Texas petition barred proceedings in Oklahoma, the court declined to decide whether the Texas order was enforceable. *Id.* at 175.

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[29] (...continued)
connection with temporary orders," in the same breath noted the PKPA protected "[t]he left-behind parent" because she "can go to court in the home state immediately after the child's removal" and "a temporary custody order can often be obtained at once, and a more secure custody decree, temporary or permanent, after notice and an opportunity to be heard, will be entered without much delay." *1979 Senate PKPA Hearing*, at 63. Senator Malcolm Wallop, the PKPA's chief sponsor, went further and stated that proposed criminal penalties for violating custody decrees could be activated based on a "temporary order entered on an ex-parte basis." *1980 House PKPA Hearing*, at 115.

In this case, the New York court entered an *ex parte* order because petitioner's daughter had been snatched from her in another State, respondent and her attorney would not divulge Talassa's whereabouts over a period of several days, nor even allow petitioner telephone contact with her daughter, and respondent had not bothered to contact the legal authorities in Minnesota, despite Talassa's presence in that State for nearly a month. 11a, 34a-35a, 54a, 58a-59a; Tr. at 16-17.

In *Elder v. Park*, 717 P.2d 1132, 1133-34 (N.M. Ct. App. 1986), the mother filed a custody proceeding in New Hampshire and obtained an *ex parte* temporary custody order after the father absconded to New Mexico with the child (with the child's consent). A week later the father filed for custody in New Mexico, but the New Mexico court held this action was barred by § 1738A(g). *Id.* at 1135. The father argued "the lack of notice precluded New Hampshire's jurisdiction from being consistent with the PKPA and that New Mexico was not required to defer to New Hampshire." *Id.* at 1137. But the New Mexico court, expressly declining to follow *Snow*, *supra*, held "a court does not lose subject matter jurisdiction because it has not yet satisfied the notice requirements imposed by the various acts. . . . The better rule, in our view, mandates deference to New Hampshire on the basis of the mother's prior filing in that state." *Id.* The court reached this result even though it held the New Hampshire *ex parte* order was not enforceable. *Id.* at 1139.

Matter of C.A.D. and *Elder v. Park* represent the overwhelming majority position of the State appellate courts that have decided this issue under the PKPA.[30] Several States

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[30] *See, e.g., Wilcox v. Wilcox*, No. 17A05-9303-CV-110, slip op. at 2-3 (Ind. Ct. App. June 16, 1994) (rejecting argument that Indiana court "forfeited its jurisdiction by failing to provide . . . notice as required by the PKPA" before granting temporary custody); *Wilcox v. Wilcox*, 862 S.W.2d 533, 545 (Tenn. Ct. App. 1993) (same); *Murphy v. Woerner*, 748 P.2d 749, 751 n.8 (Alaska 1988) (rejecting argument "that Kansas lost jurisdiction because [party] did not receive notice of hearings . . . [a]t most, any orders resulting from those proceedings would be invalid"); *Cunningham v. Cunningham*, 719 S.W.2d 224, 225, 227-28 (Tex. Ct. App. 1986) (North Carolina proceeding barred Texas from exercising jurisdiction, even though mother did not receive notice prior to entry of *ex parte* order); *State ex rel. Cooper v. Hamilton*, 688 S.W.2d 821, 823, 826 (Tenn. 1985) (even though there was no notice or service on mother in Indiana court that entered *ex parte* order, Indiana court retained jurisdiction that barred proceeding in Tennessee); *Wachter v. Wachter*, 439 So.2d 1260, 1264-66 (La. Ct. App. 1983)

(continued...)

interpreting the UCCJA's analogous priority rule also have held that a first filed proceeding in a court with jurisdiction retains priority, and the court does not forfeit jurisdiction merely because it enters an *ex parte* order.[31] Therefore, the Minnesota court's holding below is in conflict in principle with these States as well.[32]

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[30] (...continued)
(although New Jersey *ex parte* temporary custody order was not enforceable for lack of notice, first filed New Jersey action barred Louisiana's exercise of jurisdiction). *See also, e.g., Brown v. Brown*, 847 S.W.2d 496, 503, 505 (Tenn. 1993); *Giambrone v. Giambrone*, 586 N.E.2d 23, 24, 26-28 (Mass. App. Ct.), *rev. denied*, 590 N.E.2d 195 (Mass. 1992); *Archambault v. Archambault*, 555 N.E.2d 201, 203, 206 (Mass. 1990); *Matter of B.B.R.*, 566 A.2d 1032, 1035 & n.5, 1037, 1040-41 & nn. 25-26 (D.C. 1989); *Green v. Bruenning*, 690 S.W.2d 770, 770-71 (Ky. Ct. App. 1985); *Belosky v. Belosky*, 640 P.2d 471, 472-73 (N.M. 1982).

Aside from Minnesota, petitioner is aware of only two States that hold that a court forfeits jurisdiction under § 1738A(g) when it enters an *ex parte* order. *See Raywood v. Smith*, 549 So.2d 103, 104 (Ala. Civ. App. 1989); *In re Custody of Thorensen*, 730 P.2d 1380, 1385, 1387-88 (Wash. Ct. App. 1987). *See also State v. Carver*, 781 P.2d 1308, 1317-18 (Wash. 1989).

[31] *See, e.g., Carpenter v. Carpenter*, 474 A.2d 1124, 1127-28, 1131 (Pa. Super. Ct. 1984); *Quill v. Quill*, 471 N.Y.S.2d 623, 624-25 (App. Div. 2d Dep't 1984); *Agnello v. Becker*, 440 A.2d 172, 173, 177 (Conn. 1981); *In re Marriage of Weinstein*, 408 N.E.2d 952, 953, 957 (Ill. App. Ct. 1980); *Lopez v. District Court*, 606 P.2d 853, 855-56 (Colo. 1980); *Application of Pierce*, 601 P.2d 1179, 1183-84 (Mont. 1979); *Barcus v. Barcus*, 278 N.W.2d 646, 649-50 (Iowa 1979). *Contra Houtchens v. Houtchens*, 488 A.2d 726, 731 (R.I. 1985).

[32] The PKPA generally, and § 1738A(g) in particular, were modeled on the UCCJA. *1980 House PKPA Hearing*, at 113, 133 (statements of Sen. Malcolm Wallop and Prof. Russell Coombs); *1980 Joint PKPA Hearing*, at 48 (statement of Acting Deputy Attorney General Paul
(continued...)

Certiorari should be granted to resolve this significant conflict among the State courts' interpretation of § 1738A(g).

2. Emergency jurisdiction.

Because New York is Talassa's "home State," *see supra* at 22 & n.27, emergency jurisdiction is the only basis for Minnesota to enter a custody decree consistent with the PKPA.[33] The PKPA's emergency jurisdiction, like the UCCJA's emergency jurisdiction,[34] is "reserved for extraordinary circumstances." *State in Interest of D.S.K.*, 792 P.2d 118, 126-28 (Utah Ct. App. 1990). Out of a concern for "attempts at forum shopping based upon fabricated claims of the need to exercise emergency jurisdiction," courts limit its exercise to cases involving "immediate" or "imminent" harm or a "grave

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[32] (...continued)
Michel); *1979 Senate PKPA Hearing*, at 50, 167 (statements of Prof. Brigitte Bodenheimer and Sen. Malcolm Wallop); *1979 Senate Code Hearings*, at 10630 (letter from Assistant Attorney General Patricia Wald to Rep. Peter Rodino); *1977-1978 House Code Hearings*, at 1003, 1009 (statement of Russell Coombs, Dep. Chief Counsel, Sen. Judiciary Comm.). Consequently, courts use UCCJA case law as authority to interpret the PKPA. *See Matter of B.B.R.*, 566 A.2d at 1036 n.10.

[33] Although the trial court below also asserted "best interest" jurisdiction under the UCCJA, 10a-11a, under the PKPA "best interest" jurisdiction exists only if there is no "home State." 28 U.S.C. § 1738A(c)(2)(B)(i). As courts hold uniformly, the PKPA preempts inconsistent State law; therefore a State may not assert "best interest" jurisdiction when there is a "home State," as the Minnesota Court of Appeals acknowledged. 3a. *See, e.g., Brown v. Brown*, 847 S.W.2d 496, 501, 505 (Tenn. 1993); *State ex rel. Griffin v. District Court*, 831 P.2d 233, 239 n.8 (Wyo. 1992); *Shute v. Shute*, 607 A.2d 890, 893 (Vt. 1992); *Atkins v. Atkins*, 823 S.W.2d 816, 819 (Ark. 1992).

[34] *See, e.g., Trader v. Darrow*, 630 A.2d 634, 638 (Del. 1993); *In Interest of J.T.*, 485 N.W.2d 70, 73 (Wis. 1992); *Holt v. District Court*, 626 P.2d 1336, 1345 (Okla. 1981); *Brock v. District Court*, 620 P.2d 11, 14 (Colo. 1980).

emergency." *Id.* at 127. Moreover, "[e]mergency jurisdiction under the PKPA requires a more stringent showing than under the UCCJA." *Id.* at 129. While many States, like Minnesota, *see* Minn. Stat. Ann. § 518A.03(1)(c)(2), allow for emergency jurisdiction in cases of neglect under the UCCJA, the PKPA mandates a greater showing that "it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse." 28 U.S.C. § 1738A(c)(2)(C)(ii).

Thus, to find emergency jurisdiction there must be a "showing of a *present* danger to the children." *Curtis v. Curtis*, 789 P.2d 717, 723 n.11 (Utah Ct. App. 1990) (emphasis added). *See, e.g., Lundell v. Clawson*, 697 S.W.2d 836, 840 (Tex. Ct. App. 1985) ("the word 'emergency' would appear to imply an unexpected crisis demanding immediate action by the court to protect the child from physical or emotional harm"); *Marks v. Marks*, 315 S.E.2d 158, 162 (S.C. Ct. App. 1984) (must show "serious danger of immediate harm"). For example, in *Schoeberlein v. Rohlfing*, 383 N.W.2d 386, 388-89 (Minn. Ct. App. 1986), the father submitted affidavits stating that the mother had abused the children "by yelling and screaming at them," "by striking them with a belt," and by failing to provide them with adequate medical care. The court nonetheless found no emergency jurisdiction. "The allegations, although serious, relate to *past conduct* toward the children and not to the present. There was no showing of a present danger to the children . . . ." *Id.* at 389 (emphasis added). *See also Green v. Green*, 434 So.2d 52, 52-53 (Fla. Dist. Ct. App. 1983).[35]

In this case, the Minnesota Court of Appeals acknowledged

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[35] Thus, some courts hold that emergency jurisdiction is available only when conditions *within the State* create an emergency based on abuse or mistreatment. *See, e.g., Matter of McKenzie*, 439 So.2d 700, 702 (Ala. Civ. App.), *writ quashed sub nom. Ex Parte Sistrunk*, 439 So.2d 702 (Ala. 1983); *Dillon v. Medellin*, 409 So.2d 570, 575 (La. 1982). There is no allegation that abuse occurred in Minnesota. Tr. at 21-22, 57-58.

that the only claimed incident of physical injury was "not recent," 3a, having occurred *two years* before the proceeding was brought. 35a. Nonetheless, the court held, the assertion of "a recent specific threat supports the claim of emergency jurisdiction." 3a.

But there is absolutely no evidence that such a threat ever occurred -- not even a conclusory allegation, in a sworn or unsworn statement, by either respondent or the child. In finding emergency jurisdiction based solely on the *claim* of a threat, the Minnesota court is in conflict with the decisions of other States, which require some evidence to support an assertion of emergency jurisdiction under the PKPA. For example, in *State ex rel. Griffin v. District Court*, 831 P.2d 233, 239 n.8 (Wyo. 1992), "with the exception of a single, conclusory and unsupported statement in pleading by the mother's counsel that the father has a 'violent temper' and 'shook said minor child by the upper arms. . . .' there [was] nothing . . . to provide evidence for 'emergency jurisdiction'" and "there [was] no admissible evidence that the father abandoned or threatened the child with mistreatment."[36]

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[36] *See also, e.g., Matter of E.H.*, 612 N.E.2d 174, 184, 187-88 (Ind. Ct. App.) (to "meet the evidentiary burden of establishing a *bona fide* emergency," a party's "self-serving statements alone are insufficient," and a psychologist's report that indicated possible sexual abuse "standing alone, falls far short of cognizable evidence which could arguably satisfy" the evidentiary burden), *aff'd*, 624 N.E.2d 471 (Ind. 1993); *Lundell v. Clawson*, 697 S.W.2d 836, 840 (Tex. Ct. App. 1985) ("no evidence of . . . emergency circumstances"); *Jones v. Jones*, 456 So.2d 1109, 1112 (Ala. Civ. App. 1984) ("no evidence to indicate physical or emotional mistreatment or abuse of the children by the father"); *Marks v. Marks*, 315 S.E.2d 158, 160, 162 (S.C. Ct. App. 1984) (allegations of psychological and physical abuse and finding that mother "sat upon" child did not support exercise of emergency jurisdiction).

Courts apply the UCCJA's emergency jurisdiction provision in the

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Certiorari should be granted to resolve this conflict over the scope of emergency jurisdiction under the PKPA.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

CAROL A. PETERSON
Dorsey & Whitney
Pillsbury Center South
220 South Sixth Street
Minneapolis, MN 55402
(612) 340-7837

JOHN C. GRAY, JR.
(*Counsel of Record*)
ANDREW DWYER
MATTHEW BRINCKERHOFF
Brooklyn Legal Services
Corp. B
105 Court Street
Brooklyn, NY 11201
(718) 237-5500

Dated: July 18, 1994

Attorneys for Petitioner

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[36] (...continued)
same fashion. *See, e.g., Danna v. Danna*, 364 S.E.2d 694, 697 (N.C. Ct. App.) ("bare allegations" no basis for emergency jurisdiction), *rev. denied*, 370 S.E.2d 221 (N.C. 1988); *Glynn v. Meslin*, 532 A.2d 554, 556 (R.I. 1987) ("self-serving statements are not sufficient to confer emergency jurisdiction"); *Soto-Ruphuy v. Yates*, 687 S.W.2d 19, 21 (Tex. Ct. App. 1984) (no emergency jurisdiction based on "affidavit based on hearsay upon hearsay"); *Roberts v. District Court*, 596 P.2d 65, 68 & n.1 (Colo. 1979) ("self-serving statements" do not confer emergency jurisdiction). *See also Piedimonte v. Nissen*, 817 S.W.2d 260, 269 (Mo. Ct. App. 1991) ("[t]hat the neglect, or even mistreatment, of the child may be a consequence of the cohabitation of the custodian mother with a man who is not her husband does not necessarily present that kind of threat of harm that justifies" emergency jurisdiction); *Milner v. Kilgore*, 718 S.W.2d 759, 762 (Tex. Ct. App. 1986) (grandmother's testimony, *inter alia*, that "[s]he had seen the child's mother slap the child's face several times" "does not prove the existence of a dire emergency").

APPENDIX

STATE OF MINNESOTA
IN COURT OF APPEALS
C7-93-2263

Dakota County
District Court #FX939068

Lansing, Judge

In Re the Custody of: T.B.

Filed: February 22, 1994
Office of Appellate Courts

Considered and decided by Lansing, Presiding Judge, Randall, Judge, and Schumacher, Judge.

UNPUBLISHED OPINION

LANSING, Judge

This custody dispute involves a fifteen-year-old child, the child's mother, and the child's maternal grandmother. The mother seeks review of the district court's order denying her motion to dismiss the grandmother's custody petition for lack of subject matter jurisdiction. We affirm.

FACTS

The child who is at the center of this custody dispute has lived in Minnesota with her maternal grandmother for lengthy intervals that amount to almost seven years. The last time period extended from January 1985 to June of 1990. In 1990 the child returned to New York to live with her mother, her four siblings and her mother's companion. In July 1993 the child came back to Minnesota to stay with relatives.

When the child failed to return to New York on August 4, 1993, the child's mother and the mother's companion came to Minnesota to locate her. According to the mother, the child's grandmother refused to disclose the child's location. The mother returned to New York and obtained an *ex parte* order for temporary custody of the child.

When the mother and the mother's companion were unable to enforce the New York order, they requested and obtained a

district court hearing in Minnesota. At the August 18, 1993 hearing, the child's court-appointed attorney stated that the child did not want to return to New York because her mother's companion has choked and struck her, that she was afraid of him, and that he had told the child that "if she didn't shape up, be prepared to get hurt again before the end of the summer." The mother acknowledged that in 1991 she had taken the child to the hospital after her companion has struck the child, resulting in bleeding. The mother stated that the New York State Department of Social Services had investigated and determined that the hospital's report of suspected abuse was unfounded.

The district court issued an order placing temporary custody with the grandmother on the condition she file a custody petition. The petition was filed and served the same day. Approximately a week later, the mother appeared at a custody hearing in New York and obtained a second order granting temporary custody. The New York court issued a third order two weeks later, again placing temporary custody with the mother. None of the New York orders refer to the Minnesota proceeding.

The mother filed a motion in the Minnesota proceeding to dismiss for lack of subject matter jurisdiction. The district court denied the motion, and this appeal followed.

DECISION

Minnesota and New York have both adopted the Uniform Child Custody Jurisdiction Act (UCCJA). *See* Minn. Stat. ch. 518A (1992); *N.Y. Dom. Rel. Law* §§ 75-a to -z (McKinney 1988). The Act requires that a court determine jurisdiction by analyzing whether any of the four jurisdictional grounds apply, whether a proceeding is pending in a court of another state, and, if dual jurisdiction exists, the court must address the issue of inconvenient forum. *Schmidt v. Schmidt*, 436 N.W.2d 99, 104 (Minn. 1989).

The district court concluded that the jurisdictional ground of "best interest" applied because the child has spent a significant portion of her childhood years living in Minnesota with her grandmother, and there is available in Minnesota substantial evidence on the child's present or future care, protection, training and personal relationships. *See* Minn. Stat. §518A.03, subd. 1(b). The evidence of the child's extensive contacts with

Minnesota, and her presence here in her grandmother's care, supports the district court's conclusion that the child's "best interest" provides a basis for Minnesota's exercise of jurisdiction. *See Schmidt*, 436 N.W.2d at 105 (listing factors that provide basis for "best interest" jurisdiction).

The district court also found that Minnesota may exercise "emergency" jurisdiction based on the child's allegations that her mother's companion has physically abused her and has threatened further abuse. Although alleged incidents of physical injury are not recent, the allegation of a recent specific threat supports the claim of emergency jurisdiction. Because the child is physically present in Minnesota and the record supports a finding that it is necessary to protect her from abuse, we conclude that the district court did not err in exercising emergency jurisdiction. *See* Minn. Stat. § 518A.03, subd. 1(c)(2).

Jurisdiction is also governed by the federal Parental Kidnapping Prevention Act (PKPA), 28 U.S.C.A. § 1738A (West Supp. 1993). We recognize that under the PKPA, "best interest" jurisdiction applies only if no state has "home state" jurisdiction over a child. See 28 U.S.C.A. § 1738A(c)(2)(B)(i); *Biscoe v. Biscoe*, 443 N.W.2d 221, 225 (Minn. App. 1989). In this case, it is undisputed that New York qualifies as the child's "home state." *See* Minn. Stat. § 518A.02(e) (defining "home state"). But Minnesota still may exercise "emergency" jurisdiction in accordance with the PKPA. *See* 28 U.S.C.A. § 1738A(c)(2)(C)(ii).

Having concluded that there is a basis under the UCCJA and the PKPA for Minnesota's exercise of jurisdiction, we next review the district court's analysis of the effect of the New York proceedings. The mother argues that Minnesota's jurisdiction is precluded by the UCCJA's "first in time" rule, because New York already had exercised child custody jurisdiction before the grandmother filed her Minnesota petition. *See* Minn. Stat. § 518A.06, subd. 1. The district court found that the New York *ex parte* custody determination was not made consistently with the UCCJA or the PKPA because the grandmother was not given proper notice or a reasonable opportunity to be heard. We agree.

Both the PKPA and the UCCJA require that reasonable

notice and opportunity to be heard must be given to the contestants, including any person who has physical custody of the child. *See* 28 U.S.C.A. § 1738A(e); Minn. Stat. § 518A.04. The mother does not dispute that the grandmother is entitled to notice and that she was not notified of the proceeding resulting in the first *ex parte* order. That order does not contain any finding that the child is endangered by the grandmother's custody. Under these circumstances the New York proceeding did not preclude Minnesota's exercise of jurisdiction. *See Schmidt*, 436 N.W.2d at 107 (absent notice and opportunity to be heard, and absent any finding that the affected child was in danger, *ex parte* temporary custody order is invalid and the assertion of jurisdiction under the UCCJA must be set aside); *Snow v. Snow*, 369 N.W.2d 581, 583 (Minn. App. 1985) (South Dakota court lacked UCCJA jurisdiction, because that court's issuance of an *ex parte* custody order violated the notice requirement).

The final step in the UCCJA analysis is to consider whether jurisdiction should be declined because another forum would be more convenient. The district court may decline to exercise its jurisdiction if it is in the child's interest that another state assume jurisdiction. *See* Minn. Stat. § 518A.07, subds. 1,2,3.

The mother argues that the district could should have declined jurisdiction because the child has more connections with New York and because of the grandmother's improper retention of the child at the conclusion of the child's Minnesota visit. See Minn. Stat. § 518A.08 (jurisdiction declined by reason of conduct). But even if the grandmother did improperly retain the child, section 518A.08 is discretionary and does not supersede the child's best interests. *Snow*, 369 N.W.2d at 583. In this case, the record supports affirmance of the district court's determination that the child's best interests will be served by Minnesota's assumption of jurisdiction.

Although we affirm the district court's exercise of jurisdiction, we note that the record does not demonstrate that the district court has contacted the New York court about the parallel proceedings. Under the UCCJA, state courts exercising simultaneous jurisdiction have a duty to communicate and cooperate to determine which forum is most appropriate to serve the children's best interests. *See Nazar v. Nazar*, 505 N.W.2d

628, 637 (Minn. App. 1993), *pet. for rev. denied* (Minn. Oct. 28, 1993). This communication is necessary to reduce and resolve jurisdictional conflicts and must be undertaken to ensure compliance with the Act.

Affirmed.

/s/Harriet Lansing
February 14, 1994

STATE OF MINNESOTA — DISTRICT COURT
COUNTY OF DAKOTA — FIRST JUDICIAL DISTRICT

In Re the Custody of: Talassa Bacon — File No. FX-93-9068

Eileen Wilson,
Petitioner,
and
Joan Bacon,
Respondent.

ORDER

Whereas the above-entitled matter came on before the Honorable Richard G. Spicer on the 1st day of November, 1993 at the Dakota County Judicial Center, Hastings, Minnesota.

Whereas Jeffrey L. Orren, Esq., appeared on behalf of the petitioner; Carol A. Peterson, Esq., appeared on behalf of the respondent; Judith C. Nord, Esq., appeared on behalf of the child as attorney for the child.

Whereas this matter came on by Respondent's notice of motion and motion for dismissal of this case on jurisdictional grounds. Whereas a responsive motion was filed by petitioner requesting that the State of Minnesota be found to have jurisdiction over the custody of Talassa Bacon pursuant to the uniform Child Custody Jurisdiction Act, Minnesota Statutes, Chapter 518A.

Now, therefore, based upon the files, records and proceedings herein, the Court makes the following:

FINDINGS OF FACT:

1. That the minor child, Talassa Bacon, was born on November 24, 1978.

2. That Joan Bacon is the minor child's natural mother.

3. That Eileen Wilson is the minor child's maternal grandmother.

4. That the minor child lived with the following parties during the following times (these time frames are approximate thereby not listing the exact month wherein the exchanges took place):

a. 1978 - 1979 Joan Bacon

b. 1979 - 1982 Eileen Wilson
c. 1982 - 1985 Joan Bacon
d. 1985 - 1990 Eileen Wilson
e. 1990 - 1993 Joan Bacon

5. That the Federal parental Kidnapping Prevention Act, 28 U.S.C. §1738A applies to resolution of this matter.

6. That the Uniform Child Custody Jurisdiction Act, Minnesota Statutes, Chapter 518A applies to resolution of this matter.

7. That the minor child, physically present in this state, alleged that she had been physically abused in the past and was threatened with further mistreatment unless "she shaped up."

8. That a possible emergency situation exists in respect to the minor child's safety and protection from abuse of threats of mistreatment.

9. That it is in the best interest of the minor child that the state of Minnesota assume jurisdiction because the child has a significant connection with this state and there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships.

Now, therefore, based upon the foregoing Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW AND ORDER

1. That the First Judicial District Court of the State of Minnesota may properly exercise jurisdiction over the above-entitled matter and the custody dispute therein.

2. That the Petitioner's request awarding attorney's fees and costs is hereby denied.

MEMORANDUM ATTACHED HERETO IS MADE A PART HEREOF:

Dated: November 1, 1993

BY THE COURT
/s/ Richard G. Spicer
RICHARD G. SPICER
JUDGE OF THE DISTRICT COURT

MEMORANDUM

This matters comes before the Court seeking resolution as to the State of Minnesota's jurisdiction concerning a custody issue relating to the minor child, Talassa Bacon. This court finds, pursuant to Einslein v. Einslein, 112 A.D.2d 973, 492 N.W.S.2d 785 (2d Dep't 1985), that the Federal Parental Kidnapping Prevention Act, 28 U.S.C. §1738A (hereinafter PKPA) governs this matter. 28 U.S.C. §1738A(g) states that the Court of one state

> "shall not exercise jurisdiction in any proceeding for a custody determination during the pendency of a proceeding in a Court of another State where such Court of that other State is exercising jurisdiction consistently with the provision of this section to make a custody determination."

The key question, then, is whether there is a custody determination proceeding in the Court of another state preventing Minnesota from utilizing jurisdiction. In order to determine such status, the provisions set forth in the U.S.C. must be broken down into their subsequent segments.

A custody determination means "a judgment, decree, or other order of a Court providing for the custody or visitation of a child, and includes permanent and temporary orders, and initial orders and modifications." 28 U.S.C. §1738A(a)(3). The case at hand involves a temporary custody order issued by the State of New York, thus falling under the auspices of a custody determination.

The next step under the U.S.C. is to determine if there is a proceeding pending in a Court of another State which is exercising jurisdiction consistently with the provisions of this section. Although there is a proceeding in a New York Court, this Court finds that such Court is not exercising jurisdiction consistently with the provisions of this section.

28 U.S.C. §1738A(e) states:

> "Before a child custody determination is made, reasonable notice and opportunity to be heard shall be given to the contestants, any parents whose parental rights have not been previously terminated and any person who has physical

custody of a child." (emphasis added)

The maternal grandmother, Eileen Wilson, currently has physical custody of the minor child, Talassa Bacon. Further, Ms. Wilson was not given proper notice or a reasonable opportunity to be heard in respect to the issuance of the ex parte order. In fact, her attorney received a temporary order concerning custody of the minor child three (3) days after the ex parte order was granted in the New York Court system. As such, the New York ex parte custody determination was not made consistently with the provisions of the United States Code.

The Petitioner's absence of notice or opportunity to be heard in the New York Court System, therefore, prevents the Minnesota Court from applying full faith and credit to the Ex Parte Order under the PKPA or the Uniform Child Custody Jurisdiction Act (hereinafter the UCCJA). See Joel M. v. Karen M. and Marion C., 133 Misc.2d 533, 507 N.Y.S.2d 369 (1986) (Where neither the Respondent-mother nor the Respondent-maternal grandmother who had physical custody of the children were afforded any notice, the Court held that the ex parte order from another State was not entitled to full faith and credit under the PKPA or the UCCJA). See also In Re the Marriage of Schmidt, 436 N.W.2d 99 (Minn. 1989) (where the trial court order asserting jurisdiction under the Minnesota version of the UCCJA and awarding temporary custody of child to requesting parent was invalid and assertion of jurisdiction under UCCJA also had to be set aside, where parent to whom custody was not awarded was not given notice or hearing).

Under the above analysis, then, the Minnesota Court system does not have to afford the Ex Parte Order full faith and credit and may maintain jurisdiction over the matter as long as it fulfills certain requirements under the UCCJA as set forth in chapter 518 of the Minnesota Statutes.

Minn. Stat. §518A.03 states:

A Court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:

(a) this state (1) is the home state of the child at the time of commencement of the proceeding, or (2) had been the

child's home state within six months before commencement of the proceeding and the child is absent from this state because of removal or retention by a person claiming custody or for other reasons, and a parent or person acting as parent continues to live in this state; or

(b) it is in the best interest of the child that a court of this state assume jurisdiction because (1) the child and the parents, or the child and at least one contestant, have a significant connection with this state, and (2) there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships; or

(c) the child is physically present in this state and (1) the child has been abandoned or (2) it is necessary in an emergency to protect the child because the child has been subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependent; or

(d) (1) it appears that no court in another state would have jurisdiction under prerequisites substantially in accordance with clause (a), (b), or (c), or a court of another state has declined to exercise jurisdiction on the ground that a court of this state is the more appropriate forum to determine the custody of the child, and (2) it is in the best interest of the child that a court of this state assume jurisdiction.

Minnesota is obviously not the home state of the child nor had been the child's home state within six months before commencement of the proceeding. Further, it is clear that subsection (d) is not relevant to the matter at hand. Jurisdiction, therefore, may not be granted under subsection (a) or (d) of §5138A.03. The pertinent sections are (b) and (c). §5138A.03, subsection (b) addresses the connections the child maintains with the state. Although the child has not maintained Minnesota as her home state, this Court finds that she does have a significant connection with the state through her grandmother. Further, satisfying the second prong of the two part test, there is available in this state substantial evidence concerning the child's present or

future care, protection, training, and personal relationships. The child spent a significant portion of her childhood years living with her grandmother, both in Nicaragua and Minnesota. A bond has grown between the two wherein the grandmother is more than willing to become the permanent caretaker of this child. The grandmother has the financial and emotional ability to care, protect, and provide schooling for the child. Indeed, the child has, in the past, attended school in Minnesota and is currently enrolled in a school program while living with her grandmother. See Beier v. Beier, App. 1985, 371 N.W.2d 52 (there were sufficient contacts in Minnesota to establish jurisdiction for purposes of the UCCJA which provides for assumption of jurisdiction in best interest of the child if prerequisites are met, where family lived in Minnesota first four years of child's life, he attended school in Minnesota briefly, and has extended family in Minnesota).

Although it is true that the mother has provided schooling for the child while she lived in the New York apartment with her four siblings, it is not clear to this Court that the mother can provide adequate physical or emotional protection for the child. This Court includes protection from domestic abuse in its definition and application of protection under the Statute. Such allegations of abuse present another basis for jurisdiction.

Minn. Stat. §518A.03, subsection (c)(2) grants jurisdiction in those situations wherein it is necessary in an emergency to protect the child because the child has been subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependent. The child alleges that she has been physically abused by Mr. Williams and the Mr. Williams has threatened further physical abuse upon her unless "she shapes up." Although these allegations have never come to fruition through an Order for Protection or other such format, this Court finds that such allegations and threats of mistreatment provide an emergency situation from which the child needs protection. Even if the allegations are completely unfounded, the Court may rely on Minn. Stat. §518.03, subdivision (b) to provide jurisdiction.

This Court, through Judge Thuet and Judge Spicer, finds that the Ex Parte Order issued in the State of New York without notice to Eileen Wilson, the grandmother, is not the type of

Order to which the statutes contemplate giving "full faith and credit." Further, through allegations of abuse and the child's history of living with her grandmother for many years, that there is much more "behind the scenes" to this matter than a simple custody dispute. As such, this Court has assumed jurisdiction over the child custody determination.

R.G.S.

STATE OF MINNESOTA — DISTRICT COURT
COUNTY OF DAKOTA — FIRST JUDICIAL DISTRICT

In the matter of the welfare of:
TALASSA BACON-WILLIAMS, Child. — **ORDER**

The above entitled matter came on for hearing before the undersigned Judge of District Court at the Dakota County Judicial Center, Hastings, on August 18, 1993, pursuant to the Order dated August 17, 1993. Appearing were the following persons:

Talassa Bacon-Williams, Child
Joan Bacon, Child's Mother
Thomas J. Williams, Significant Other to Child's Mother
Amanda Brown, Maternal Aunt
Eileen Wilson, Maternal Grandmother
Jeffrey L. Orren, Attorney for Maternal Aunt and Grandmother
Judith C. Nord, Attorney for Child
Kathryn Peterson, Assistant Dakota County Attorney
Jackie Arnold, Dakota County Community Services Department

Based upon the statements made by each of the persons above named and the arguments of counsel, the Courts makes the following:

ORDER

1. If either Amanda Brown or Eileen Wilson seeks custody of the Child, she shall file a Petition in accordance with the provisions of the Uniform Child Custody Jurisdiction Act, Minn. Stat., Sec. 518A.01, et seq., with the Dakota County District Court, Hastings, on or before August 20, 1993, at 1:00 p.m.

2. In the event a Petition is filed, and pending further hearing or Court Order, temporary custody of the Child shall be with the Petitioner (either Amanda Brown or Eileen Wilson).

3. Until August 20, 1993, at 1:00 p.m., or such time as a

Petition is filed, whichever is sooner, temporary custody of the child shall be with Amanda Brown.

4. In the event a Petition is not filed in accordance with the terms of this Order, custody of the child shall be returned to Joan Bacon on August 20, 1993, at 1:00 p.m., and Joan Bacon shall be permitted to return the child to her home in the State of New York.

5. Except as set forth in this Order, the child shall not leave the State of Minnesota without a Court Order.

6. Joan Bacon shall be entitled to reasonable visitation with the child in the State of Minnesota and she shall be permitted to have liberal contact with her by telephone and mail during the pendency of these proceedings.

7. The Dakota County Community Services Department shall complete a custody and/or home study in the event a Petition is filed as set forth herein.

8. Judith Nord, Esq., is appointed to represent the child in all proceedings herein.

9. All further proceedings shall be conducted before the Juvenile Division of the Dakota County District Court and scheduled accordingly.

10. The attached memorandum is made a part hereof.

DATED: This 19th day of August, 1993.

BY THE COURT
/s/ William F. Thuet
WILLIAM F. THUET
JUDGE OF DISTRICT COURT

MEMORANDUM

The Child is the 14 year old daughter of Joan Bacon. She resides in Brooklyn, New York with her mother, four siblings and Thomas J. Williams. Her mother sent her to Minnesota this summer to visit with Amanda Brown and Eileen Wilson, Ms. Bacon's sister and mother. At the conclusion of the visit, Ms. Brown and/or Ms. Wilson refused to return her to New York and the custody of her mother.

The Child has alleged that she has been physically abused by Mr. Williams and that Mr. Williams has threatened further

physical abuse upon her unless "she shapes up." She is fearful of Mr. Williams and she does not want to return to her house in Brooklyn.

The Child has lived the majority of her life with Eileen Wilson and attended schools in St. Paul for several years. Her ties to Ms. Wilson and Ms. Brown are close. She is a mature 14 year old.

The Court believes that the "best interests" of the Child are tantamount to these proceedings. Because physical abuse has been exhibited in the past, the Court believes that the Child's fear of future physical abuse is legitimate. Further, the Court believes that there is "more than meets the eye" in the relationships between the interested parties.

The Court appreciates that a Court Order was issued by the New York Family Court on August 13, 1993, awarding custody to the Child's mother. However, this Order was obtained Ex Parte and neither the child nor Eileen Wilson were notified of the hearing or able to attend. This is not the type of Order to which the statutes contemplate giving "full faith and credit".

WFT

STATE OF MINNESOTA
IN COURT OF APPEALS

In Re the Custody of: T.B.

O R D E R
C7-93-2263

BASED UPON THE FILE, RECORD AND PROCEEDINGS, AND BECAUSE:

1. This appeal was filed November 15, 1993.

2. Appellant seeks review of an order filed November 3, 1993, denying her motion to dismiss for lack of jurisdiction under the Uniform Child Custody Jurisdiction Act (UCCJA).

3. In the statement of the case, appellant indicated the transcript already has been prepared.

4. Appellant is the mother of T.B., and respondent is T.B.'s maternal grandmother. Appellant is a resident of New York. T.B. is currently living with respondent in Minnesota.

5. Appellant moves to expedite the appeal, and requests that this court issue a decision on the merits by December 31, 1993. Appellant indicates this schedule would result in the least disruption to T.B.'s schooling because, if this court reverses the district court, T.B. will be able to begin school in New York at the beginning of the term on January 3, 1994.

6. This court routinely expedites appeals involving child custody. See Minn.App.Spec.R.Pract.1. We will expedite this appeal consistent with our practice in other cases involving child custody, but appellant has not established a compelling reason for issuance of an opinion by December 31.

7. We note that even if this court did issue a decision reversing the district court by December 31, T.B. likely would not be returned to New York by January 3, 1994, because this court's decision would not become final until 30 days after filing or until disposition of a petition for review to our supreme court, whichever is later. See Minn. R. Civ. App. P. 136.02.

IT IS HEREBY ORDERED:

1. Appellant's motion to expedite the appeal is granted, in part.

2. This matter is expedited and briefing shall be accelerated as follows:

(a) appellant's brief shall be filed by November 29, 1993;

(b) respondent's brief shall be filed within 15 days after service of appellant's brief; and

(c) appellant's reply brief, if any, shall be filed within five days after service of respondent's brief.

3. This appeal will be submitted for consideration without oral argument and opinion release will be accelerated. See Minn. R. Civ. App. P. 134.01 (reconsideration of this court's decision to deny oral argument may be requested).

Dated: November 19, 1993

BY THE COURT

/s/ Paul H. Anderson
Chief Judge

STATE OF MINNESOTA
IN COURT OF APPEALS

In Re the Custody of: T.B.

O R D E R
C7-93-2263

BASED UPON THE FILE, RECORD AND PROCEEDINGS, AND BECAUSE:

1. This appeal was filed November 15, 1993. Appellant seeks review of an order filed November 3, 1993, assuming jurisdiction over the parties' child custody dispute.

2. With the notice of appeal, appellant filed a motion to expedite. In support of the motion, appellant submitted an affidavit describing T.B.'s custodial history and the parties' past communications regarding T.B.'s custody.

3. By order dated November 19, 1993, this court granted the motion to expedite, in part. This court's order indicated that the appeal would be expedited consistent with our practice in other cases involving child custody. The order directed that appellant's brief be filed by November 29, 1993, that respondent's brief be filed within 15 days after service of appellant's brief, and that appellant's reply brief, if any, be filed within 5 days after service of respondent's brief. This court's order also denied oral argument and expedited opinion release.

4. On November 23, 1993, the Clerk of the Appellate Courts received respondent's motion opposing appellant's proposed briefing schedule. Respondent's counsel indicates that he is a sole practitioner and that his schedule between now and the end of the year is busy. Counsel also states that in addition to briefing the merits, he also intends to argue that the November 3 order is not appealable.

5. An appeal of right may be taken from an order assuming jurisdiction under the Uniform Child Custody Jurisdiction Act. Snow v. Snow, 369 N.W.2d 581, 583 (Minn. App. 1985).

6. Appellant's brief was filed on November 24, 1993. We will extend respondent's briefing period as specified below.

7. Respondent submitted an extensive affidavit challenging a number of the factual allegations made in appellant's affidavit.

Respondent moves to strike both appellant's affidavit and her own responsive affidavit as irrelevant to the motion to expedite. Appellant opposes the motion to strike her affidavit and argues that the affidavits of respondent and her counsel should be stricken because they are an improper attempt to supplement the district court record.

8. Although both parties' affidavits contain extraneous detail, they were apparently submitted for the purpose of determining whether there is good cause to accelerate this appeal even more than has been this court's usual practice. The parties' respective motions to strike are unnecessary, because the affidavits will not be considered in deciding this appeal on the merits. See Thiele v. Stich, 425 N.W.2d 580, 582-23 (Minn. 1988) (appellate court may not base its decision on matters outside the record on appeal, and may not consider matters not produced and received in evidence below).

9. In a letter filed on November 22, 1993, respondent's counsel raises two other issues that require brief discussion. First, respondent's counsel objects to the Clerk of the Appellate Courts classification of this appeal as a "juvenile" matter. Because the appeal does not pertain to any juvenile court proceeding, we agree with respondent that it should be classified as a family law matter.

10. Respondent's counsel also claims that appellant is using an incorrect case caption. It appears that the parties disagree as to the child's correct surname.

11. The Clerk of the Appellate Courts properly referred to the case caption used in the November 3 district court order. To protect the child's identity, initials rather than the child's full name are used for the appellate case caption.

IT IS HEREBY ORDERED:

1. This court's November 19, 1993 order expediting the appeal is amended to provide that respondent's brief shall be served and filed by December 20, 1993.

2. The balance of this court's November 19, 1993 order remains in effect.

3. The parties' respective motions to strike affidavits filed in connection with appellant's motion to expedite are denied.

4. The Clerk of the Appellate Courts shall classify this

appeal as a family rather than as a juvenile case.

5. The proper case heading for the appeal is "In Re the Custody of: T.B." The parties shall refer to T.B. by her initials rather than full name in all future filings with this court.

Dated: November 30, 1993

BY THE COURT

/s/ Paul H. Anderson
Chief Judge

STATE OF MINNESOTA
IN COURT OF APPEALS

In Re the Custody of: T.B.

ORDER
C7-93-2263

BASED UPON THE FILE, RECORD AND PROCEEDINGS, AND BECAUSE:

1. This appeal was filed November 15, 1993. Appellant seeks review of an order filed November 3, 1993, assuming jurisdiction over the parties' child custody dispute.

2. Appellant's brief was filed on November 24, 1993.

3. On November 30, 1993, this court issued an order determining, among other things, the proper case heading for the appeal. To protect T.B.'s identity, this court's November 30 order directed the parties to refer to T.B. by her initials rather than full name in all future filings with this court.

4. On December 21, 1993, respondent filed a motion to strike appellant's brief and appendix on the ground that they contain references to T.B. using her full name. Appellant opposes the motion, pointing out that this court's November 30 order directing the parties to use T.B.'s initials pertains to future filings.

5. Appellant has not violated this court's November 30 order, because she filed her brief before this court's order issued. There is no statutory requirement to prevent disclosure of the child's identity in a custody dispute. Cf. Minn. Stat. § 260.161, subd. 2 (1992) (records relating to an appeal from a nonpublic juvenile court proceeding nonaccessible to the public). Respondent has not established good cause to strike appellant's brief.

IT IS HEREBY ORDERED:

1. Respondent's motion to strike appellant's brief and appendix is denied.

2. This matter remains scheduled for nonoral consideration on January 24, 1994.

Dated: December 29, 1993

BY THE COURT

/s/ Paul H. Anderson
Chief Judge

STATE OF MINNESOTA
IN SUPREME COURT
C7-93-2263

In Re the Custody of: T.B.

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition for further review in the above-entitled matter be, and the same is, denied.

Dated: April 19, 1994

BY THE COURT:

/s/ Alexander Keith
Chief Justice

PUBLIC LAW NO. 96-611
94 STAT. 3566

SHORT TITLE

Sec.6.Sections 6 to 10 of this Act may be cited as the "Parental Kidnaping Prevention Act of 1980".

FINDINGS AND PURPOSES

Sec.7.(a)The Congress finds that-

(1) there is a large and growing number of cases annually involving disputes between persons claiming rights of custody and visitation of children under the laws, and in the courts, of different States, the District of Columbia, the Commonwealth of Puerto Rico, and the territories and possessions of the United States;

(2) the laws and practices by which the courts of those jurisdictions determine their jurisdiction to decide such disputes, and the effect to be given the decisions of such disputes by the courts of other jurisdictions, are often inconsistent and conflicting;

(3) those characteristics of the law and practice in such cases, along with the limits imposed by a Federal system on the authority of each such jurisdiction to conduct investigations and take other actions outside its own boundaries, contribute to a tendency of parties involved in such disputes to frequently resort to the seizure, restraint, concealment, and interstate transportation of children, the disregard of court orders, excessive relitigation of cases, obtaining of conflicting orders by the courts of various jurisdictions, and interstate travel and communication that is so expensive and time consuming as to disrupt their occupations and commercial activities; and

(4) among the results of those conditions and activities are the failure of the courts of such jurisdictions to give full faith and credit to the judicial proceedings of the other jurisdictions, the deprivation of rights of liberty and property without due process of law, burdens on commerce among such jurisdictions and with foreign nations, and harm to the

welfare of children and their parents and other custodians.

(b) For those reasons it is necessary to establish a national system for locating parents and children who travel from one such jurisdiction to another and are concealed in connection with such disputes, and to establish national standards under which the courts of such jurisdictions will determine their jurisdiction to decide such disputes and the effect to be given by each such jurisdiction to such decisions by the courts of other such jurisdictions.

(c) The general purposes of sections 6 to 10 of this Act are to --

(1) promote cooperation between State courts to the end that a determination of custody and visitation is rendered in the State which can best decide the case in the interest of the child;

(2) promote and expand the exchange of information and other forms of mutual assistance between States which are concerned with the same child;

(3) facilitate the enforcement of custody and visitation decrees of sister States;

(4) discourage continuing interstate controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child;

(5) avoid jurisdictional competition and conflict between State courts in matters of child custody and visitation which have in the past resulted in the shifting of children from State to State with harmful effects on their well-being; and

(6) deter interstate abductions and other unilateral removals of children undertaken to obtain custody and visitation awards.

FULL FAITH AND CREDIT GIVEN TO CHILD CUSTODY DETERMINATIONS

Sec.8.(a) Chapter 115 of title 28, United States Code, is amended by adding immediately after section 1738 the following new section:

"§1738A. Full faith and credit given to child custody determinations

"(a) The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsection (f) of this section, any child custody determination made consistently with the provisions of this section by a court of another State.

"(b) As used in this section, the term --

"(1) 'child' means a person under the age of eighteen;

"(2) 'contestant' means a person, including a parent, who claims a right to custody or visitation of a child;

"(3) 'custody determination' means a judgment, decree, or other order of a court providing for the custody or visitation of a child, and includes permanent and temporary orders, and initial orders and modifications;

"(4) 'home State' means the State in which, immediately preceding the time involved, the child lived with his parents, a parent, or a person acting as parent, for at least six consecutive months, and in the case of a child less than six months old, the State in which the child lived from birth with any of such persons. Periods of temporary absence of any of such persons are counted as part of the six-month or other period;

"(5) 'modification' and 'modify' refer to a custody determination which modifies, replaces, supersedes, or otherwise is made subsequent to, a prior custody determination concerning the same child, whether made by the same court or not;

"(6) 'person acting as a parent' means a person, other than a parent, who has physical custody of a child and who has either been awarded custody by a court or claims a right to custody;

"(7) 'physical custody' means actual possession and control of a child; and

"(8) 'State' means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United States.

"(c) A child custody determination made by a court of a State is consistent with the provisions of this section only if--

"(1) such court has jurisdiction under the law of such State; and

"(2) one of the following conditions is met:

"(A) such State (i) is the home State of the child on the date of the commencement of the proceeding, or (ii) had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State;

"(B)(i) it appears that no other State would have jurisdiction under subparagraph (A), and (ii) it is in the best interest of the child that a court of such State assume jurisdiction because (I) the child and his parents, or the child and at least one contestant, have a significant connection with such State other than mere physical presence in such State, and (II) there is available in such State substantial evidence concerning the child's present or future care, protection, training, and personal relationships;

"(C) the child is physically present in such State and (i) the child has been abandoned, or (ii) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse;

"(D)(i) it appears that no other State would have jurisdiction under subparagraph (A), (B), (C), or (E), or another State has declined to exercise jurisdiction on the ground that the State whose jurisdiction is in issue is the more appropriate forum to determine the custody of the child; and (ii) it is in the best of interest of the child that such court assume court jurisdiction; or

"(E) the court has continuing jurisdiction pursuant to subsection (d) of this section.

"(d) The jurisdiction of a court of a State which has made

a child custody determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant.

"(e) Before a child custody determination is made, reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been previously terminated and any person who has physical custody of a child.

"(f) A court of a State may modify a determination of the custody of the same child made by a court of another State, if –

"(1) it has jurisdiction to make such a child custody determination; and

"(2) the court of the other State no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination.

"(g) A court of a State shall not exercise jurisdiction in any proceeding for a custody determination commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising jurisdiction consistently with the provisions of this section to make a custody determination.".

STATE OF MINNESOTA
COUNTY OF DAKOTA

DISTRICT COURT
FIRST JUDICIAL DISTRICT
FAMILY COURT DIVISION

In Re the Custody of: Talassa Bacon-Williams

Eileen Wilson,
Petitioner,
and
Joan Bacon,
Respondent.

File No. FX-93-9068

AFFIDAVIT
OF JOAN BACON

STATE OF NEW YORK)
) ss.
COUNTY OF KINGS)

JOAN BACON, being duly sworn, deposes and says:

1. I am the mother of Talassa Bacon-Williams. I am the Respondent in this proceeding.

2. My fiance, Thomas J. Williams ("T.J."), and I have had five children together: Talassa, born November 24, 1978; Cristina, born January 18, 1980; Alexis, born November 2, 1983; Thomas, Jr., born May 28, 1985; and Tristan, born July 29, 1986. My fiance T.J. is the father of all five children, and I have no other children. T.J. and I have not yet been able to marry because he has not yet finalized his divorce from his previous wife. My children and I live at 2980 West 28th Street, Brooklyn, New York, where we have lived for over nine years. I work as a teacher at the St. John the Baptist Catholic School. I have worked as a teacher at Catholic schools for four years. My finance, T.J., is employed by the New York City Metropolitan Transit Authority, where he has worked for eight years.

3. With the exception of Talassa, whose situation I explain more fully below, all of my children have lived with me in Brooklyn throughout their entire lives.

4. For most of their school age years, my children have attended Catholic schools. We are not opposed to public schools (indeed, initially some of my children attended public school), and, of course, sending my children to Catholic school has required some financial sacrifice. Nonetheless, I believe this

sacrifice is necessary because of the importance of education, and because I believe the schools my children are attending provide a higher quality of education and greater discipline than can be found in the local public schools. My children have excelled at school. They have received excellent grades, consistently made honor roll, and won several certificates of achievement and other scholastic awards.

5. My children are happy, healthy and well-adjusted, and their upbringing has been entirely unremarkable. During the entire lives, no one has ever suggested that I am unfit to raise my children, nor suggested that it is not in their best interests to be raised by me, nor challenged my custody of them in any way.

6. After my eldest child, Talassa, was born in November, 1978, she lived with me in New York City for the first year of her life. In December, 1979, when Talassa was a little over a year old, my mother, Petitioner Eileen Wilson, visited New York City on a business trip. At the time, my mother was living in Nicaragua, where I had been born and raised. Because my family was from Nicaragua, and because I still had many relatives living there, my mother wanted to take Talassa there for an extended visit.

7. Originally, I was to follow to Nicaragua for a visit as well. (I did not immediately travel with my mother and Talassa, because I was pregnant with my second daughter, Cristina.) However, shortly thereafter, the civil war in Nicaragua broke out, and travel into the country became difficult and dangerous. As a result, I was separated from Talassa for several months.

8. To understand what occurred in the years that followed, it is necessary to understand something about my own upbringing in Nicaragua. Along with the rest of my siblings, I was raised more by my grandmother than my mother, because my mother often was forced to be away from home for work. As a result, my mother never really had the experience of being able to raise her own children. Consequently, I believe my mother wanted to raise my daughter Talassa as her own child, to make up for the fact that she was never able to raise her own children.

9. Because of the war in Nicaragua, my mother and Talassa left Nicaragua near the end of 1980 or early 1981, and moved to Minneapolis-St. Paul, Minnesota. My mother's

decision to take my daughter to another state was very much against my wishes. I had expected that when my mother returned to the United States she would bring Talassa directly to me, but instead she took Talassa with her to Minnesota. My mother chose to move to Minnesota because my sister, Amanda, was already living there with her husband, Luis.

10. Talassa continued to live with my mother in Minnesota for several months. I was able to visit her only once during this period, due to financial constraints. Finally, in May or June of 1982, when Talassa was about three-and-one-half years old, my mother returned Talassa to live with me in New York City.

11. Talassa continued to live with me until 1985, without incident. She had graduated from kindergarten, and had gone through the first half of first grade. (At that time, Talassa was attending Public School 121. Although we were not in P.S. 121's catchment area, I had obtained a special permit from school system to allow Talassa to go there, because it was a better school.) No one ever suggested that there was anything wrong with the way I was raising Talassa.

12. Nonetheless, around this time my mother and my sister Raquel (living in Yonkers, New York, at the time) began putting incredible pressure on me to allow Talassa again to live with my mother in Minnesota. I was going through a particularly vulnerable period of my life. In addition to Talassa, I had two other young children at that time, my daughter Cristina (then five years old) and my daughter Alexis (then two years old), and I was pregnant with T.J., Jr. Moreover, I was unemployed at the time.

13. To further complicate matters, T.J., the children's father, was not living in the household at the time. He was consumed by caring for his daughter from his prior marriage, Tanisha. Sadly, Tanisha has cerebral palsy. As a result, she is blind, hearing impaired, cannot sit up, cannot speak, cannot feed herself, and has the mental capacity of a seven-month-old baby. Caring for Tanisha fell to T.J. at the time, and that enormous effort took him away from our family for a time. Eventually, he moved back into our household in May, 1985. (Tanisha, who is fourteen years old, still lives in Brooklyn with her mother.)

14. Thus, under pressure from my mother and my sister

Raquel, in January, 1985, I allowed my mother to take Talassa to live with her in Minnesota. At the time, my mother assured me that it would only be a temporary absence to allow me to get my life together. But it eventually became apparent that my mother saw my difficulty as an opportunity to take Talassa away from me entirely and to raise her as her own daughter.

15. Despite my mother's original promises, she kept Talassa long after she should have returned her to me. I kept asking my mother to return Talassa to me, specifically demanding that Talassa be returned for school in September, 1985, but my mother refused, telling me over and over that she wanted to keep Talassa just a little while longer, because she had become attached to her. No doubt a great deal of the problem was due to my upbringing in Nicaragua, because Latin culture had instilled in me the belief that I was expected to give my mother unquestioning obedience.

16. Not only were my mother's broken promises to return Talassa evidence of her desire to keep Talassa permanently as her own daughter, but during the time that Talassa was living with her, my mother made every effort to undermine Talassa's relationship with me and to build a wall of separation between us. Because of financial constraints, because we had four small children and because T.J. was working nights and unable to take leave from work, I was unable to visit Talassa in Minnesota. Knowing this, one might expect my mother to bring Talassa with her during my mother's periodic visits to New York City during this period. Yet, except for one visit for Christmas, 1985, when Talassa came to New York with the rest of my relatives, my mother steadfastly refused to bring Talassa with her to see us in New York because, my mother said, she was afraid that if Talassa came to New York, she would not return to Minnesota. (I remained in touch with Talassa during this period by speaking with her regularly on the phone.) Even worse, it appears that during this time my mother succeeded in convincing Talassa that my finance, T.J., is not her real biological father, even though he is.

17. Finally, in June or July of 1990, as my demand for Talassa's return became more insistent, my mother finally relented and returned Talassa to live with me in New York City.

I did not anticipate this, but returning Talassa to me caused a major rift between my mother and me. Only a week or so after Talassa was returned to me, my mother called me on the telephone, and we had a terrible fight, in which my mother cruelly attacked me. Thereafter, my mother and I spoke only infrequently. My mother never visited talassa during the next three years she was living with me, and Talassa never visited my mother or other relatives in Minnesota. Nor was there much communication between Talassa and my mother, either in writing or on the phone.

18. Initially, I think, living in Brooklyn was a period of adjustment for Talassa. During the time she was living with my mother in Minnesota, Talassa was very much like an only child. (When she lived in Minnesota, Talassa lived with my mother, my mother's second husband, Stephen, and his daughter, Stephanie, who is about ten years older than Talassa. Although Stephanie was in their household at the time, because she was so much older, Talassa received the treatment one might expect for an only child. Stephanie no longer lives with my mother. My mother and her second husband have now divorced; they were going through the process of separation when Talassa was living with them. My mother now lives alone; she is sixty-five years old.)

19. As a result, I think Talassa initially found it difficult to adjust to a household with four other, younger children, with whom she had to compete for the attention of her parents. Eventually, however, Talassa became re-integrated into our family, and got along quite well.

20. In the course of living with us, Talassa attended three different Catholic schools. The first year, 1990-91, she attended Our Lady of Solace. The next year, 1991-92, Talassa, along with the rest of our children, switched to Our Lady of Refuge. Finally, for 1992-93, Talassa went to the Catherine McAuley High School. She was planning to attend her second year at Catherine McAuley this fall.

21. Talassa excelled at school. She consistently made the honor roll and won several awards. For example, when she graduated from Our Lady of Refuge, she won awards in language arts and in science, and in her first year at Catherine McAuley

she received an achievement award in computer science and won the 1992-93 Women in Science award from St. Johns University. Overall, her class rank from her first year at Catherine McAuley was 18 out of 99 students. (I was the President of the PTA at Talassa's school last year, so I was actively involved with events at her high school.)

22. During the entire past three years that Talassa has been living with us in New York City, no one in my family -- including my mother and my sister Amanda -- has ever suggested that it was not in Talassa's best interests to be raised by me, nor suggested that it was a mistake that Talassa was living with me in New York. Neither my mother nor my sister Amanda ever suggested that they wanted Talassa back living with them in Minnesota. This is in sharp contrast to when Talassa and I were separated, when I repeatedly insisted that she be returned to me.

23. After Talassa had been living with us again for the past three years, this summer in early July I sent my children Alexis, Thomas, Jr. and Tristan for a vacation to visit my sister Amanda in Minnesota. They left for Minnesota around July 5th.

24. Initially, we did not think Talassa could leave New York for a summer vacation, because we had been told that she needed to take a regents exam in math in August. We later learned, however, that it would be better for her to take the exam during the regular school year, during which she could prepare for the exam. Therefore, because it was no longer necessary for Talassa to remain in New York to study for the exam, we offered her a chance to go out of town for a summer vacation as well.

25. We did not immediately decide where to send her, but asked her whether she preferred to visit her Aunt Amanda in Minnesota, or her Aunt Raquel, now living in Miami, Florida. Talassa actually wanted to go to Miami, not Minnesota. After giving it some thought, however, we decided it would be better for her to go to her Aunt Amanda in Minnesota, where the rest of the children were visiting. So, on July 18th, Talassa boarded the plane for Minnesota. She and the other children were to return to New York on August 4th.

26. This turned out to be a terrible mistake. In retrospect, my mother obviously saw Talassa's visit to Amanda as a golden opportunity to take Talassa from us and keep her in Minnesota,

so that she again could have a daughter to raise.

27. Instead of staying with Amanda, as we had planned, the children stayed with my mother because a friend of Amanda's, Lisa, was living with Amanda temporarily. We were not even informed of this until after the children arrived in Minnesota. According to my other children, shortly after Talassa arrived, my mother began asking her if she would like to stay with her in Minnesota, and not return to New York. Initially, Talassa said she did not want to stay, but my mother kept asking her, and finally, a few days before she was to return to New York, Talassa agreed to stay in Minnesota.

28. On August 4th, my other children -- Alexis, T.J. and Tristan -- got off the plane in New York, but Talassa was not there. My mother never even bothered to tell me in advance that she was not sending Talassa home.

29. The next day, my fiance T.J. and I drove out to Minnesota. We arrived on August 6th. When we got to my mother's house, however, no one was there. I knew my mother eventually would have to return, because she would have to go to work on Monday, August 9th. Therefore, I decided to wait at Amanda's house until my mother showed up. My fiance T.J. drove back to New York on August 7th.

30. On August 8th, as I expected, my mother returned to her house, but without Talassa. She refused to say where Talassa was. I stayed in Minnesota until August 12th, finally flying back to New York on the ticket that had been intended for Talassa. During the entire time I was there, my mother would not allow me to see Talassa, or even tell me where she was, or even allow me to speak with her on the telephone. My mother told me that she had hired an attorney, Jeffrey Orren, and that he was telling her to hide Talassa from me in this way. On August 10th, I went with my mother to meet with Mr. Orren about the matter. I asked Mr. Orren to instruct my mother to return Talassa to me, but he refused. When I complained that Mr. Orren had told my mother to hide Talassa from me, Mr. Orren proudly said that he wished all his clients followed his instructions as well as my mother. Mr. Orren at one point suggested setting up a meeting between Talassa and myself, in Mr. Orren's office, but he never called me back on this, and the

meeting was never arranged.

31. When I returned to New York on August 13, I filed a petition for Talassa's custody in the Family Court of the State of New York. A copy of the Petition is attached hereto as Exhibit A. That court issued an Order for Temporary Custody that same day. A copy of the Order is attached as Exhibit B. My fiance T.J. and I then returned to Minnesota, hoping to use the New York court's temporary custody order to regain custody of Talassa and return her to New York.

32. Unfortunately, we had difficulty enlisting the police in West Saint Paul to enforce the Order. (Actually, we had an opportunity to enforce the Order ourselves, because when we arrived Talassa had been left alone with other children at Amanda's home. But we wanted to regain custody with the explicit approval of local law enforcement, and not just "snatch" Talassa the way she had been take from us.)

33. Frustrated, we called a local attorney out of the phone book to get some advice about what to do. He suggested that we contact a local court, to see if we could get an order from a Minnesota court requiring that we be given custody of Talassa. Therefore, we called William J. Thuet, Judge of this Court, who agreed to hold a proceeding on August 18th. The next day, he issued an Order awarding temporary custody of Talassa to my sister Amanda. On August 19th, while we were still in Minnesota, I was served with the custody petition in this proceeding.

34. While I will not respond to every false claim made in the Petition in this case, I would like to make the following points:

(a) The Petition alleges physical abuse of Talassa, but that allegation of abuse is completely false. To my knowledge, there has been only one incident in Talassa's life when either I or my fiance hit Talassa for any reason. This occurred in 1991, when Talassa was living with us in New York, and my fiance slapped her because she was misbehaving. As a result, Talassa had a nose bleed, and I took her to the hospital. Although she was not seriously injured, because she was examined at the hospital, a routine report of child abuse was made and investigated by the New

York State Department of Social Services. In March, 1992, we were told that the report had been determined to be "unfounded" by the Department of Social Services. A copy of the letter informing us of this is attached hereto as Exhibit C.

(b) At the August 18th hearing, Jeffrey Orren, my mother's attorney, made the unsupported claim that the New York investigation had found no abuse only because Talassa somehow had been pressured into "recanting" her allegations of abuse. This is not true. Mr. Orren simply does not understand what occurred with the New York investigation. The investigation was not triggered because Talassa made a report of abuse to the authorities; rather, the investigation was triggered as a routine matter because I brought Talassa to a hospital. Talassa did not "recant" her allegations of abuse quite simply because there was nothing to recant. Upon information and belief, Talassa was interviewed by caseworkers for the Child Welfare Administration, both at the hospital, and later at our home, and on each occasion Talassa's explanation of what happened was the same.

(c) Equally false is my mother's allegation that Talassa did not receive medical care while living with us in Brooklyn. In fact, contrary to my mother's claim, Talassa -- like the rest of my children -- did go to the dentist while in Brooklyn. She received other necessary medical care as well. For example, Talassa was fitted for a new prescription of glasses only a few weeks before her visit to Minnesota.

(d) The Petition also falsely states that it would be only the "maintenance of continuity" for Talassa now to live in Minnesota, and that we have "voluntarily" placed her to live there for nine years. I have already detailed the history of Talassa's living arrangements. Three points should be obvious. First, Talassa has been living for the past *three years* in New York. To suggest that moving Talassa to Minnesota would be a "maintenance of continuity" is simply ridiculous. Second, Talassa has lived in Minnesota for less than eight years of her life, not the nine years my mother claims. Third, Talassa's extended stay in Minnesota had been entirely the product of my mother's deceptive and

manipulative efforts to take Talassa away from me, as exhibited by her most recent effort to snatch Talassa from me. The notion that such efforts would be rewarded by being the basis for awarding my mother permanent custody is more than I can bear.

(e) I also take strong exception to the suggestion in my mother's petition that she forms a more "long-term and stable family unit" than my family. My mother's "family unit" now consists entirely of herself, now that Stephanie has moved out and my mother has become divorced from her second husband. Nor did my mother consistently provide the most "stable" family unit when Talassa was living with her. After all, when Talassa was last living with her, my mother was in the process of separating from her second husband.

(f) In contrast, my four other children have lived in the same home, with the same parents, for over eight years. There was no lack of "stability" to Talassa's life with us. Ironically, the idea that I cannot provide a stable home environment for children must come as something of a surprise to my sister Amanda, who four years ago named me as the godmother for two of her children.

(g) Finally, I strongly object to the claim im my mother's petition that I am distant from Talassa and do not love her as much as my other children. I love Talassa, no less than my other children. If I have not had the opportunity to be as close to Talassa as I would like, it is largely because of my mother's efforts to keep Talassa away from us and undermine my relationship with her.

35. At the proceeding in this Court on August 18, 1993, we advised everyone that a hearing would be held in the New York proceeding on August 25. Neither my mother nor her attorney appeared at that hearing, despite the fact that they had such notice. We explained the situation to the New York court, which issued a second order continuing the award of temporary custody of Talassa to me. A copy of that Order is attached hereto as Exhibit D. The New York court has also issued a third such order, a copy of which is attached hereto as Exhibit E.

FURTHER AFFIANT SAITH NOT.

/s/ Joan Bacon
Joan Bacon

Subscribed and sworn to before me
this 12th day of October, 1993.

/s/ Andrew Dwyer
Notary Public

EXHIBIT A

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

.....

In the Matter of a Proceeding for (Custody) (Visitation) under Article Six of the Family Court Act

Docket No. V14795/93

PETITION for (CUSTODY) (UNIFORM CHILD CUSTODY JURISDICTION ACT)

Joan Bacon

Petitioner,

-against-

Eileen Wilson

Respondent.

.....

TO THE FAMILY COURT:

The undersigned Petitioner respectfully shows that:

1. Petitioner, Joan Bacon, resides at 2980 W. 28th St., APT 1947, Bklyn 11224.
2. Petitioner is mother of the child.
3. (Upon information and belief) Respondent resides at 78 Isabel St., St. Paul Minn.
4. (Upon information and belief) Respondent is MGM of the child.
5. This proceeding is commenced pursuant to section(s) of the Family Court Act (in that an order of referral was made and entered on , 19 , by the Supreme Court County, referring the issue of (custody) (visitation) to the Family Court of the State of New York in and for the County of) (and of the Domestic Relations Law).
6. The name, present address, age and date of birth of each child affected by this proceeding are as follows:

NAME	ADDRESS	AGE	DATE OF BIRTH
Talassa Bacon Williams	2980 W. 28th St. Bklyn	14	11/24/78

7. (Upon information and belief) During the last five years each child affected by this proceeding lived at:

NAME	ADDRESS	DURATION from	to
Talassa Bacon Williams	2980 W. 28th St. Bklyn	1990	7/17/93
Talassa Bacon Williams	unk address- Minnesota	1988	1990

8. (Upon information and belief) The name and present address of the person(s) with whom each child lived during the past five years are as follows:

NAME	ADDRESS	DURATION from	to
Joan Bacon	2980 W.28th St. Bklyn	birth 1990	1988 7/17/93
Thomas Williams	Same	same	same
Eileen Wilson	unk address- Minnesota	1988	1990

9. Petitioner has (not) participated as a (party) (witness) ( ) [specify other capacity] in other litigation concerning the custody of the same child(ren) in (New York State) ( ) [specify other state] (or any other state).
10. (Upon information and belief (A) (No) custody proceeding concerning the custody of the same child(ren) is pending in (New York State ( ) [specify other state] (or any other state) (which has (not) been stayed by order of the court).
11. (Petitioner was married to the Respondent on , 19 , at) (and on , 19 , (was) (legally separated) (divorced) (the marriage was annulled) by order of , County of . A true copy of the (judgment) (separation agreement) is annexed hereto.)
12. (An order of filiation was made) (A paternity agreement or compromise was approved) by the Family Court of County on , 19 , concerning the (Petitioner) (Respondent) and the child(ren) who (is) (are) the subject of this proceeding. A true copy of said (order) (agreement or compromise) is annexed hereto.
13. (Upon information and belief) Respondent obtained custody of the child on 7/17/93, as follows: Petr sent the child on

7/17/93 for a two week visit w/ maternal aunt and was to be returned 8/4/93. MGM when to aunt's home and took child and is now refusing to return the child. Petr went to resp's home and cd nopt find resp. or child. Resp. retuened to her home without the child and refused to give the whereabouts of petr's child. Petr loves the child and feels that the child should continue to be raised by petr. Petr asks that respondent be ordered to return the child to petr's custody immediately.

14. There has been a change of circumstances since entry of the (order) (judgment) awarding (custody) (visitation) in that:
15. It would be in the best interest of the child to have custody awarded to the Petitioner for the following reasons: petr further states that her 4 children were sent on the vacation and resp. has refused to return the one child. Petr wants all of children to remain together and be raised by petr.
16. No previous application has been made to any court or judge for the relief herein requested, (except:

WHEREFORE, Petitioner prays for an order awarding (custody) (visitation) of the child(ren) named herein to (the Petitioner) ( ) and for such other and further relief as the Court may determine.

DATED: 8/13/93

/s/ Joan Bacon
Petitioner

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

.....

In the Matter of a Proceeding for (Custody) under Article of the Family Court Act

Docket No. V14795/93

AFFIDAVIT (UCCJA)

Joan Bacon

Petitioner,

-against-

Eileen Wilson

Respondent.

.....

STATE OF NEW YORK)
ss.:
COUNTY OF KINGS)

Joan Bacon of 2980 W.28th St., apt 1947, Bklyn 11224, being duly sworn deposes and says:

1. I am above petitioner, residing at above address and am the Petitioner in the above-entitled proceeding.

2. (Upon information and belief) each child affected by this proceeding lives at:

NAME	ADDRESS	DURATION	
		from	to
Talassa Bacon Williams	2980 W. 28th St. Bklyn	1984	present

3. (Upon information and belief) During the last five years each child affected by this proceeding lived at:

NAME	ADDRESS	DURATION	
		from	to
Talassa Bacon Williams	2980 W. 28th St. Bklyn	1990	present
Talassa Bacon Williams	unknown address, Minnesota	1988	1990

4. (Upon information and belief) The name and present address of the person(s) with whom each child lived during the past five years are as follows:

NAME	ADDRESS	DURATION from	to
Joan Bacon	2980 W.28th St. Bklyn	birth 1990	1988 7/17/93
Thomas Williams	same	same	same
Eileen Wilson	unk address- Minnesota	1988	1990

5. (Petitioner) (Respondent) has (not) participated as a (party) (witness) ( ) [specify other capacity] in other litigation concerning the custody of the same child(ren) in (New York State) ( ) [specify other state] (or any other states).

6. Petitioner has (no) information of any custody proceeding concerning the custody of the same child(ren) pending in (New York State) ( ) [specify other state] (or any other state (which has (not) been stayed by order of court), (except):

7. Petitioner (does not) know(s) of any person not a party to the proceedings who has physical custody of the child(ren) affected by this proceeding or who claims to have custody or visitation rights with respect to the same child(ren).

/s/ Joan Bacon
(Petitioner) (Respondent)

Sworn to before me this
Aug 13, 1993

/s/ Antoinette N. Adams
(Deputy) Clerk of the Court
Notary Public

AFFIDAVIT OF PERSONAL SERVICE

FAMILY COURT
STATE OF NEW YORK
COUNTY OF KINGS:

RETURN DATE 8/25
PART: 17
DOCKET NO: V14795/93

I, Thomas J. Williams, (name of Person Making Service) being duly sworn, depose and say:

1. That I am at least 18 years of age and not a party to the action, and reside at: 2980 W. 28th St., (Street), #1947, Brooklyn, (City) N.Y. (State).

2. On the 16th day of August, 1993, at 4:30 PM (Specify day or night) at _____ in the City of St. Paul, Minn, County of Ramsey, State of , I personally served the (Order to Show Cause) (Petition) on Eileen Wilson (Name of Person Served) in the above-mentioned action, by delivering to and leaving copies of each with Jeffrey L. Orren, Atty (Name/to whom papers given) at said time and place.

3. I knew the person so served to be Jeffrey Orren, Attorney at Law (Name/to whom papers given) (I believe this person would give the papers to the respondent).

4. DESCRIPTION OF PERSON SERVED:

Sex: M color of skin: White hair: Brown approx. age: 30's approx. ht: 5'5" approx. wt: 185 other identifying features: mustache & eyeglasses.

* * *

Sworn To Before me this
24th day of August, 1993

/s/ Andrew Dwyer
(Notary Public)

/s/ Thomas J. Williams
(Signature Person Serving Papers)

EXHIBIT B

PRESENT:

Hon. MAUREEN A. MCLEOD

Judge

At a term of the Family Court of the State of New York, held in and for the County of Kings, at 283 Adams St., Bklyn, NY on AUG. 13, 1993.

.....

In the Matter of a Proceeding for (Custody) (Visitation) under Article of the Family Court Act

Docket No. V14795/93

ORDER DIRECTING TEMPORARY CUSTODY

Joan Bacon

Petitioner,

-against-

Eileen Wilson

Respondent.

.....

The Petitioner herein having filed a petition on 8/13, 1993, pursuant to Section of the Family Court Act, requesting an order awarding (custody) of the minor child(ren) named therein; and

Respondent having appeared before this Court to answer the petition, having been advised by the Court of the right to counsel, and to show why an order of (custody) (visitation) should not be granted: and Respondent having (denied) (admitted) the allegations of the petition; and

The matter having duly come on to be heard before this Court;

NOW, after examination and inquiry into the facts and circumstances of the case and after hearing the proofs and testimony offered in relation thereto; it is hereby

(ADJUDGED

; (and it is further)

(ADJUDGED that there had been a change of circumstances since the entry of the (order) (judgment) dated , 19 , awarding (custody) (visitation) in that:

; (and it is further)

ADJUDGED that it would be in the best interest of the child(ren) named herein to have temporary custody awarded to Petitioner (Joan Bacon)

Talassa Bacon Williams
DOB 11-24-78

; (and it is further)

ORDERED

ADJ 8/25/93 Pt 17

ENTER

DATED: AUG. 13 1993

/s/ Maureen A. McLeod
J.F.C.

EXHIBIT C

NEW YORK STATE
DEPARTMENT OF SOCIAL SERVICES
40 NORTH PEARL STREET
ALBANY, NEW YORK 12243

MARCH 11, 1992

CESAR A. PERALES
COMMISSIONER

MR. THOMAS WILLIAMS
2980 W. 28TH ST
BROOKLYN, N.Y. 11224

RE: REPORT OF SUSPECTED CHILD
ABUSE OR MALTREATMENT
NYS REGISTER # 876077

DEAR MR. WILLIAMS

RECENTLY YOU WERE NOTIFIED OF THE EXISTENCE OF A REPORT OF SUSPECTED CHILD ABUSE OR MALTREATMENT UNDER THE ABOVE REGISTRY NUMBER. THE ORIGINAL NOTIFICATION EXPLAINED THAT THE MATTER WAS UNDER INVESTIGATION.

WE CAN NOW INFORM YOU THAT AS A RESULT OF THE ASSESSMENT MADE BY THE LOCAL CHILD PROTECTIVE SERVICE, NO CREDIBLE EVIDENCE WAS FOUND TO BELIEVE THAT THE CHILD(REN) HAS BEEN ABUSED OR MALTREATED. THE REPORT HAS, THEREFORE, BEEN CONSIDERED "UNFOUNDED".

IN ACCORDANCE WITH THE LAW, ALL INFORMATION THAT IN ANY WAY WOULD IDENTIFY PERSONS NAMED IN THIS REPORT HAS BEEN EXPUNGED (ERASED) FROM THE NEW YORK STATE CHILD ABUSE AND MALTREATMENT REGISTER. THE LOCAL CHILD PROTECTIVE SERVICE HAS ALSO BEEN NOTIFIED TO EXPUNGE ALL SUCH IDENTIFYING INFORMATION FROM THE LOCAL CHILD ABUSE AND MALTREATMENT REGISTER.

THESE ACTIONS ARE DONE ROUTINELY AND DO NOT REQUIRE ANY ACTION BY YOU. HOWEVER IF YOU HAVE ANY QUESTIONS CONCERNING THIS LETTER, PLEASE CONTACT THE NEW YORK STATE CHILD ABUSE AND MALTREATMENT REGISTER.

SINCERELY,
/s/ S. R. Berman
SANFORD R. BERMAN, DIRECTOR
STATE OPERATIONS
DIVISION OF SERVICES

EXHIBIT D

PRESENT:

Hon. MAUREEN A. MCLEOD

Judge

At a term of the Family Court of the State of New York, held in and for the County of Kings, at 283 Adams St., Bklyn, NY on SEP. 7, 1993.

.....

In the Matter of a Proceeding for (Custody) (Visitation) under Article 6 of the Family Court Act

Docket No. V14795/93

ORDER DIRECTING TEMPORARY CUSTODY

Joan Bacon

Petitioner,

-against-

Eileen Wilson

Respondent.

.....

The Petitioner herein having filed a petition on 8/13, 1993, pursuant to Section of the Family Court Act, requesting an order awarding (custody) (visitation) of the minor child(ren) named therein; and

Respondent having appeared before this Court to answer the petition, having been advised by the Court of the right to counsel, and to show why an order of (custody) (visitation) should not be granted: and Respondent having (denied) (admitted) the allegations of the petition; and

The matter having duly come on to be heard before this Court;

NOW, after examination and inquiry into the facts and circumstances of the case and after hearing the proofs and testimony offered in relation thereto; it is hereby

(ADJUDGED

; (and it is further)

(ADJUDGED that there had been a change of circumstances since the entry of the (order) (judgment) dated , 19 , awarding (custody) (visitation) in that:

; (and it is further)

ADJUDGED that it would be in the best interest of the child(ren) named herein to have temporary custody awarded to Petitioner, Joan Bacon of child Talassa Bacon Williams, DOB 11-24-78;

; (and it is further)

ORDERED

ADJ 9/21/93 Pt 17

ENTER

DATED: SEP. 7 1993

/s/ Maureen A. McLeod
J.F.C.

EXHIBIT E

PRESENT:

Hon. MAUREEN A. MCLEOD
Judge

At a term of the Family Court of the State of New York, held in and for the County of Kings, at 283 Adams St., Bklyn, NY on AUG. 13, 1993.

.....

In the Matter of a Proceeding for (Custody) (Visitation) under Article 6 of the Family Court Act

Docket No. V14795/93

ORDER DIRECTING TEMPORARY CUSTODY

Joan Bacon

Petitioner,

-against-

Eileen Wilson

Respondent.

.....

The Petitioner herein having filed a petition on 8/13, 1993, pursuant to Section of the Family Court Act, requesting an order awarding (custody) (visitation) of the minor child(ren) named therein; and

Respondent having appeared before this Court to answer the petition, having been advised by the Court of the right to counsel, and to show why an order of (custody) (visitation) should not be granted: and Respondent having (denied) (admitted) the allegations of the petition; and

The matter having duly come on to be heard before this Court;

NOW, after examination and inquiry into the facts and circumstances of the case and after hearing the proofs and testimony offered in relation thereto; it is hereby

(ADJUDGED

; (and it is further)

(ADJUDGED that there had been a change of circumstances since the entry of the (order) (judgment) dated , 19 , awarding (custody) (visitation) in that:

; (and it is further)

ADJUDGED that it would be in the best interest of the child(ren) named herein to have temporary custody awarded to Petitioner

Talassa Bacon Williams
DOB 11-24-78

; (and it is further)

ORDERED

ADJ 8/25/93 Pt 17

DATED: AUG. 13, 1993

ADJ 8/31/93 Pt 17

DATED: AUG. 25, 1993

8/31/93 to 9/21/93

SEP. 21, 1993 to 11/9/93

ENTER

/s/ Maureen A. McLeod
J.F.C.

[1]STATE OF MINNESOTA DISTRICT COURT
COUNTY OF DAKOTA FIRST JUDICIAL DISTRICT

In the Matter of the Welfare of:
Talassa Bacon-Williams, Child

The above-entitled matter came on for hearing before the Honorable William F. Thuet, one of the judges of the above-named court, at the Dakota County Judicial Center, Hastings, Minnesota, on the 18th day of August, 1993.

APPEARANCES:

JEFFREY L. ORREN, Attorney for Maternal Aunt and Grandmother.

JUDITH C. NORD, Attorney for Child.

KATHRYN PETERSON, Assistant Dakota County Attorney.

JACKIE ARNOLD, Dakota County Community Service Department.

TALASSA BACON-WILLIAMS, child.

JOAN BACON, Child's Mother.

THOMAS J. WILLIAMS, Significant other to Child's Mother.

AMANDA BROWN, Maternal Aunt.

[2]EILEEN WILSON, Maternal Grandmother.

* * *

[3]THE COURT: This matter was brought to my attention, and I will lay the background out on the record with what I know about this case and how it comes before me now.

Yesterday afternoon, I received a telephone call from Thomas Williams who indicated that he was the father of Talassa Bacon-Williams. He indicated that he and the child's mother lived together in Brooklyn, New York. I recall they have five children and that Talassa is one of those five children. That this past summer, [4] as I recall, four of the children were sent here to Minnesota to visit with the maternal grandmother, Eileen Wilson -- three of the children. Well, I am not sure --

MS. NORD: The maternal aunt.

THE COURT: Well, I was told that, as I recall, they were

to visit with the grandmother. In any event, the children were sent here to Minnesota, and as I recall it was four children sent to Minnesota for summer visitation. That three of the children were returned to Brooklyn, New York and the fourth child, Talassa, did not return. That Ms. Bacon, Mr. Williams or the two of them, then called the grandmother in Minnesota, as I remember, and told -- instructed her to place Talassa on the next available flight to New York and they refused to do this.

That Mr. Williams and Ms. Bacon then drove here to the State of Minnesota to obtain custody of the child. That the child could not be located in the State of Minnesota. That they then returned back to Brooklyn and they obtained a Court Order from a Superior Court Judge or Supreme Court in Brooklyn, awarding them custody of the child. That they then drove back here to the State of Minnesota with the New York Court Order and went to the St. Paul Police Department and requested their assistance in obtaining the custody of the child [5] who at that point they believe was living with Eileen Wilson, the maternal grandmother. That the St. Paul Police apparently went to the home and she was not at the home. It was determined she was living with her aunt, Amanda Brown.

Amanda Brown lives in West St. Paul. They then went to the West St. Paul Police Department with the New York Court Order and the West St. Paul Police Department refused to pick the child up without a Minnesota Court Order.

This is the basic background that was relayed to me yesterday afternoon. I had not seen the New York Court Order. I had not met personally with Mr. Williams, and I did communicated with Mr. William. I had no reason to believe that what he was telling me was not true.

Based on those representations, and let me backtrack. I believe I asked Mr. Williams at that time if there were any outstanding Court Orders from any Court, be it Minnesota, New York or elsewhere, that awarded custody of Talassa to anyone other than themselves and he said no. Based on that representation I attempted to contact the County Attorney and I was not successful so I issued an Order which awarded custody of the child to the Dakota County Community Services [6] Department for placement last night. I directed the West St. Paul

Police Department to assist in obtaining custody of the child and I scheduled the matter for a hearing at 1:30 today.

I think that basically brings us up to why wer are here today. This was done on my own motion. There has no Petition filed with the Court so I want to make a decision today on where this child should reside.

Is there a New York Court Order, sir?

THOMAS WILLIAMS: Yes, there is.

THE COURT: Could I have that, please?

* * *

[9]MS. NORD: Your Honor, Talassa has lived with her grandmother, Eileen Wilson, since approximately the fourth grade. She is currently fourteen years of age. From the fourth grade up until about the seventh or eighth grade, sixth grade, she lived with her grandmother in Minnesota. She then lived with her mother back in New York for three years and came to Minnesota for a visit, she lived with her grandmother, which is where she has been for the last two weeks.

When it came time for her to go back she told her grandmother that she did not want to go back because of the physical abuse that has occurred in her home. She has told me that her mother is not married to Mr. Williams, to Thomas Williams, but that he has somehow adopted her. That is not her father and it is not her stepfather to her belief. She has discussed with me in the last fifteen minutes that I have talked with her, whic is right before court, that he has been physically abusive of her and that she is scared for her own [10] well-being to go back living with him. She has asked me to ask the Court to let her continue living with her grandmother until some type of custody evaluation or reunification plan can be put into effect. So, I am asking the Court for her to be allowed to continue living with her grandmother until such time as any allegation of abuse can be checked out and a custody evaluation or anything else that the Court deems appropriate can happen.

She has explained to me at a couple of occasions where she was choked and her mother brought her to the hospital. Where she was physically slapped and her mother brought her to the hospital. So, the mother is completely aware of physical abuse against this child, and I don't know if it is against all of the

children or just Talassa.

THE COURT: Okay. Yes, ma'am.

JOAN BACON: Talassa was slapped once, she bled. I took her to the hospital knowing at that point what could happen if I took my child there. I could have jeopardized my other four kids but still I took her to the hospital. I was investigated almost for six months. They came to my home and went to my job. They did not find any type of abusive action in the house. She was not choked and I did not take her to the [11] hospital for being choked. She was grabbed by her shoulder and shook. That is three years ago.

THE COURT: How many years ago, ma'am?

JOAN BACON: Three years ago, sir.

THE COURT: And, this was investigated by the State of New York?

JOAN BACON: In the State of New York and there was no allegation, it was not found as an abusive home.

MS. NORD: Immediately prior to her coming to Minnesota to visit Talassa told me she was again abused, was threatened that if she didn't behave or act in the way she was told to act that she would again be hit. For that reason she is asking to be allowed to stay with her grandmother in Minnesota.

* * *

[12]THE COURT: Here are the problems that I have quite frankly and I will be very forthright. One, this case, if there was any abuse that occurred at all it occurred in the State of New York. That is where the evidence is, not here in the State of Minnesota, but in the State of New York. I don't necessarily, I shouldn't say necessarily, I don't believe that it is fair that this matter be litigated here in Minnesota. The child's home state, under the Child Custody Jurisdiction Act, is the State of New York. The child has lived in Brooklyn for the last three years; evidence is in Brooklyn; she was sent here to Minnesota for a visit. I don't think anybody denies that. But now to force a custody dispute in the State of Minnesota, quite frankly I don't believe this is the appropriate [13] form. Not to mention the fact that we have a New York Court Order that says that the mother has custody of the child. It seems to me that we have to give full faith and credit to other Court Orders from other states because if

we don't we will chaos in this country.

* * *

[14]JOAN BACON: He was also served with a Petition to --

MR. ORREN: That same New York Petition you have was handed to me, which is not proper service on Ms. Wilson.

JOAN BACON: Well, you represent her.

THE COURT: Was your client served with the Petition:

MR. ORREN: No, she wasn't, Your Honor. I was, a copy of the Petition was given to me, but that is --

THE COURT: When?

MR. ORREN: The day before yesterday, but that is not --

THE COURT: Well, this is an Order.

MR. ORREN: There was a Petition that went along with it also.

THOMAS WILLIAMS: A copy of the Order is with the Petition.

MR. ORREN: But, it was never served on Ms. Wilson.

THOMAS WILLIAMS: It was served on her attorney.

[15]MR. ORREN: If you want to explain the law to them, Your Honor, on personal service.

THE COURT: Is it set for a hearing in New York?

JOAN BACON: Yes.

THE COURT: When is the hearing set in New York?

JOAN BACON: The 25th.

THE COURT: The 25th of August?

THOMAS WILLIAMS: Yes.

THE COURT: So, there is a hearing set in New York?

THOMAS WILLIAMS: Yes.

* * *

[29]THOMAS WILLIAMS: Your Honor, we are here and they haven't mentioned the other children in the household. Are they saying that if this is an abusive home that the other children shouldn't be protected?

THE COURT: I think we are only concerning ourselves with one child here today, sir.

MS. NORD: There is no allegation of abuse against the other children at this point in time.

THOMAS WILLIAMS: There is no abuse being alleged anywhere except for here.

* * *

[30]THE COURT: It's all kind of relevant to indicate the way this is coming down and the way this is done. So far I have heard, and you can contradict, by all means, contradict it if you can. What Ms. Bacon is saying is that she came here to Minnesota and spent five days and she doesn't know where her daughter is here in the State of Minnesota.

MR. ORREN: I can't contradict that.

* * *

[33]JOAN BACON: Your Honor, the night when I called and asked Talassa why she was not, at two o'clock in the afternoon, and asked her why she was not on the plane, the only answer that child gave me was, I do not want to go back, I have decided I want to make a life of my own. I said, how can a fourteen-year-old make that? My mother spoke with me that Wednesday night, she did not bring up no allegation of Talassa being abused or anything, she only said to me that Talassa does not want to go back. When I said we were coming for Talassa, that is when I heard from my sister that lives in Miami that this abuse case was brought up. Nothing of that was told to me when I spoke to her on the phone. She did not tell me that Talassa said she was being abused.

* * *

[35]MS. NORD: Your Honor, we are not alleging abuse by Talassa's [illegible], we are alleging that there is abuse by this man, whoever he is, whether he is her father, stepfather or biological father.

* * *

[37]MS. NORD: * * * * In order for New York to have jurisdiction the parties have to be served.

THE COURT: New York has [38] jurisdiction. There is no ands, ifs or buts about New York having jurisdiction. The girl has lived there for three years.

* * *

[41]THE COURT: Anything else?

JOAN BACON: They said I knew where my child was, but for five days that I was here by myself, I wasn't able to know exactly where she was. Telling me that she was at a friend's house is not telling me exactly where Talassa was. My mother

said she didn't know the phone number. That is not telling me exactly where she is at.

* * *

[42]THE COURT: There is not admitted abuse. If there was admitted abuse there would be a substantiation of that abuse and everything I am told is that it was unsubstantiated. That is what I am told, am I right?

JOAN BACON: It was investigated, Your Honor. I was investigated at school and also by my neighbors. Gentlemen visited my house on many occasions to see exactly how -- Talassa was interviewed [43] by herself and we got a letter saying it was unfounded.

* * *

[45]THE COURT: Again, these are all incidents that occurred in the State of New York, that are properly investigated in the State of New York, not here in Minnesota. Something that happened three years ago in the State of New York. You folks can make allegations of abuse that happened three years ago in the State of New York and how are these folks supposed to defend against them. New York is the place to litigate them. Not Minnesota.

* * *

[46]THE COURT: There has been nothing filed before this Court, nothing before this Court under the Uniform Child Custody Jurisdiction Act. If there was a proceeding filed under the Uniform Child Custody Jurisdiction Act I would call the Judge in New York and I would discuss with the Judge in New York on what the appropriate form would be because that is the way it says you are supposed to do it. You can't run two custody proceedings in two different states at the same time. It appears that there is one pending in the State of New York at this time.

MR. ORREN: Then we would ask for twenty-four hours to get one pending --

THE COURT: There is already one pending in the State of New York. I will read from the Uniform Child Custody Jurisdiction Act. "To avoid jurisdictional competition and conflicts with Courts of other States in matters of child custody and to promote cooperation with the Courts of other States so

that a Custody Decree is rendered in the State that can best [47] decide the case in the best interests of the child. The second purpose of the Act is to deter abductions and other unilateral removals of children undertaken to obtain custody awards." And that is exactly what happened here. To avoid relitigation of custody decision in other States is the purpose of the Act.

* * *

THE COURT: But, at some point you have to make a decision as to what Court is going to decide the case. There is a pending proceeding in the State of New York, that is undisputed. It is undisputed that this is the child's home state for the last three years, that is undisputed. It is undisputed that there is more information in the State of New York concerning any abuse than there is in the State of Minnesota. The only ties that we have to the State of Minnesota are [48] one, the fact that she lived here for a period of time, three or more years ago; two, that there is family members living in the State of Minnesota; and three, she happens to be here at this time. As far as the other, all the other things, New York is the appropriate form to litigate this. You say fine, it is unfair to my client to have to go to New York. Okay, again, who are we concerned with, are we concerned with the child or are we concerned with your clients? I mean, the sword cuts two ways.

* * *

[56]THE COURT: The record should reflect that the parties have had discussions for the last, a little over an hour and a half or so. I just had an opportunity to discuss this with the attorney for the child, because I am not going to speak to the child directly and I think that Ms. Nord is the mouthpiece for the child so to speak.

* * *

[58]THE COURT: I have my heart and my head and my head tells me one thing and my heart tells me another. Ultimately what is in the best interests of this fourteen-year-old child, I think that is, and there is pros and cons to everything here. It's not an easy decision to make. I wish I could walk out of here right now and make a right decision. Whatever decision I make I can assure you that everybody is not going to be happy with it.

My head tells me that this case ought to go back to New York because that is where the best evidence is and that is where this case is going to be tried, it ought to be tried in New York. That is what my head tells me. But my heart tells me that, that there is some valid concerns on the safety and welfare of this child. And, that perhaps, you know, she should remain living here in the State of Minnesota.

[59]To be honest with everyone here, I have never been to New York and I really have no desire to go to New York because I am afraid of big cities, although I like Chicago, but I watch TV I guess. I just think God every day that I don't live in New York City. Maybe that is a prejudice I have that is in my heart, I don't know but it is a dog-eat-dog world and there is no such thing as "Minnesota nice" in New York City. It's a tough place. If you survive maybe you are a stronger person and a better person but again I don't know, I -- I can't say a lot about it because I haven't been there.

* * *

[62]THE COURT: * * * * Right now as I sit here talking to you, quite frankly, strictly legally speaking I think the case belongs in New York, strictly legally speaking. Maybe, you know, maybe from another standpoint it doesn't. I don't know.

STATE OF MINNESOTA — DISTRICT COURT
FIRST JUDICIAL DISTRICT
COUNTY OF DAKOTA — FAMILY COURT DIVISION

In Re the Custody of: Talassa Bacon
Eileen Wilson,
Petitioner,
and
Joan Bacon,
Respondent.

PETITION FOR CUSTODY OF TALASSA BACON

File Number: _____

COMES NOW YOUR PETITIONER, Eileen Wilson, as and for her Petition for Custody of Talassa Bacon, states and alleges as follows:

I.

IDENTIFICATION OF PARTIES

That the true and correct names and addresses of the parties are as follows:

Petitioner: Eileen Wilson
78 East Isabel Avenue
Saint Paul, Minnesota

Respondent: Joan Bacon
2980 West 28th Street
Apartment 1947
Brooklyn, New York

II.

SUBJECT CHILD

That the correct name and address of the child who is subject of this action is:

Child: Talassa Bacon
1061 Hall Street
West Saint Paul, Minnesota

III.

JURISDICTION

That the Minnesota District Court has jurisdiction over this matter pursuant to the Minnesota Uniform Child Custody

Jurisdiction Act as follows:

1. The child is physically present in the State of Minnesota and it is necessary in an emergency to protect the child because the child has been subjected to or threatened with mistreatment or abuse and is otherwise neglected or dependent pursuant to Minn.Stat. §518A.03, subd 1(c)(2)(1993), or

2. It is in the best interest of the child that a court of the State of Minnesota assume jurisdiction because the child and at least one contestant have a significant connection with the State of Minnesota and there is available in the State of Minnesota substantial evidence concerning the child's present or future care, protection, training and personal relationships pursuant to Minn.Stat. §518A.03, subd 1(b)(1993); and

3. This Court has jurisdiction over the custody determination sought in this Petition because a person other than a parent has filed this Petition in the county where the child is found pursuant to Minn.Stat. §518.156, subd. 1(b),

IV.

VENUE

That Dakota County is the appropriate venue for this matter because the child is present within Dakota County at the time of the commencement of this action.

V.

RELATIONSHIPS

That Petitioner, Respondent and the Child represent three generations of the same family, Petitioner is the maternal grandmother of the Child and Respondent is the mother of the child.

VI.

BEST INTERESTS OF THE CHILD

That awarding permanent legal and physical custody of the Child to Petitioner would serve the best interests of the child pursuant to Minn.Stat. §518.17, subd. 1 (1993) because (numbered to correspondent to subsections):

2. The child has a reasonable preference to live with Petitioner rather than Respondent, and the child is of sufficient

age and maturity to express a preference;

3. Petitioner has been the Child's primary caretaker for the majority of the Child's life;

4. The child has a close and intimate relationship with Petitioner and is distant from Respondent, and Respondent has in the past admitted that she does not love the Child as much as she loves her other children;

5. The Child has positive interaction and interrelationship with Petitioner and her cousin present in Minnesota;

6. The Child is well adjusted to life with Petitioner and in Minnesota, and has attended school successfully in this state;

7. The Child's environment with Respondent is short term and has not been stable, the Child's living relationship with petitioner has been long-term, stable, and satisfactory, and the benefits of the Child's relationship with Petitioner outweighs the desirability of maintaining continuity, or in the alternative placing the Child with Petitioner would in fact be a maintenance of continuity;

8. Petitioner has provided a long-term and stable family unit within which to care for and nurture the Child;

9. Petitioner is more stable than Respondent emotionally, and the mental health of the Child will be positively served by permanent placement with Petitioner;

10. Petitioner has a greater capacity and disposition to give the Child love, affection and guidance than Respondent, and Petitioner is more likely to continue educating and raising the child in the Child's culture and religion; and

12. The negative effect on the Child of the actions of an abuser, to wit physical abuse by Respondent's live-in boyfriend.

VII.

VOLUNTARY PLACEMENT OF CHILD WITH PETITIONER

That Respondent voluntarily allowed the Child to live with Petitioner for nine of the Child's fourteen years, and Petitioner at all time provided adequate and loving care and affection for the Child.

VIII.

FINANCIAL SUPPORT

That Petitioner provided for the Child financially at all times

during the period of the Child living with Petitioner, without contribution from Respondent, including ongoing provision for medical and dental care and by having provided medical and dental insurance for the Child since the Child was one year of age until the present, and Petitioner did not seek public assistance while she was responsible for the care of the child.

IX.

MEDICAL AND DENTAL CARE

That Respondent failed to provide adequate medical and dental care for the Child during the time the Child has lived with Respondent, to wit: the Child was not taken for regular physical examinations and the Child was not taken to the dentist for a three year period. Petitioner immediately provided a physical and dental care (the Child had several cavities) as soon as the Child arrived from a three year stay with Respondent.

X.

ACTS OF DOMESTIC CHILD ABUSE

That Respondent has failed to adequately protect the Child from domestic child abuse perpetrated by Respondent's live-in boyfriend.

XI.

REPRESENTATION

That the parties are represented by counsel as follows:

Petitioner by:	Jeffrey L. Orren, Esq. 400 Exchange Building 26 East Exchange Street St. Paul, MN 55101-2264
Respondent by:	Unknown
Child by:	Judith C. Nord, Esq. Strandemo & Associates 2125 Upper 55th Street East Inver Grove Heights, MN 55077

NOW THEREFORE, Petitioner prays for the Judgment and Decree of the court granting the following relief:

1. JURISDICTION Finding that the Minnesota District Court has jurisdiction over the custody of Talassa Bacon as set

forth above;

2. VENUE Finding that Dakota County is the appropriate venue for this matter;

3. BEST INTERESTS Finding that it would serve the best interests of the Talassa Bacon to live with her maternal grandmother, the Petitioner, pursuant to Minn.Stat. §518.17, subd. 1 (1993) as set forth above;

4. CUSTODY Awarding Petitioner the sole legal and physical custody of Talassa Bacon;

5. VISITATION Awarding Respondent reasonable visitation with the Child;

6. CHILD'S PROPERTY Order Respondent to forthwith ship all of the Child's personal property to the Child; and

7. OTHER RELIEF Granting such other and further relief as the Court deems just, fair and equitable in the premises.

Date: August 19, 1993

/s/ Jeffrey L. Orren
Jeffrey L. Orren
Attorney for Petitioner
400 Exchange Building
26 East Exchange Street
Saint Paul, MN 55101-2264
(612) 224-1364
A.R.N.: 177489

STATE OF MINNESOTA
COUNTY OF DAKOTA

DISTRICT COURT
FIRST JUDICIAL DISTRICT
FAMILY COURT DIVISION

In Re the Custody of: Talassa Bacon-Williams
Eileen Wilson,
Petitioner,
and
Joan Bacon,
Respondent.

File No. FX-93-9068

ANSWER TO PETITION
AND CROSS-PETITION

Respondent Joan Bacon, for her Answer to the Petition, states and alleges:

1. Admits the allegations in Paragraph I of the Petition.
2. Denies the allegations in Paragraph II of the Petition.
3. Denies the allegations in Paragraph III of the Petition.
4. Denies the allegations in Paragraph IV of the Petition.
5. Admits the allegations in Paragraph V of the Petition.
6. Denies the allegations in Paragraph VI of the Petition.
7. With respect to the allegations in Paragraph VII of the Petition, Respondent admits that Petitioner provided adequate care for Respondent's daughter, but denies the remaining allegations of Paragraph VII.
8. Admits, upon information and belief, the allegations in Paragraph VIII of the Petition.
9. Denies the allegations in Paragraph IX of the Petition.
10. Denies the allegations in Paragraph X of the Petition.
11. With respect to the allegations in Paragraph XI of the Petition, Respondent admit, upon information and belief, the allegations as to the representation of Petitioner, and states that Respondent is represented in this proceeding by Carol A. Peterson, Dorsey & Whitney, Pillsbury Center South, 220 South Sixth Street, Minneapolis, Minnesota 55402, and Andrew Dwyer, Brooklyn Legal Services Corp. B, 105 Court Street, Brooklyn, New York 11201.
12. Denies each and every other allegation of the Petition except as specifically admitted herein.
13. This Court lacks jurisdiction over this matter under the Parental Kidnapping Prevention Act, 28 U.S.C. §1738A.
14. This Court lacks jurisdiction over this matter under the

Uniform Child Custody Jurisdiction Act, Minn.Stat. §518A.01, et seq.

15. The Court should decline to exercise jurisdiction under Minn.Stat. §518A.08 because Petitioner improperly retained Talassa after a visit.

16. This is an inconvenient forum pursuant to Minn.Stat. §518A.07.

17. This case should not proceed until a guardian ad litem is properly appointed for Talassa Bacon-Williams.

18. Petitioner has not and cannot make the requisite showing to support an award to her of legal and/or physical custody of Talassa Bacon-Williams.

CROSS-PETITION FOR CUSTODY OF TALASSA BACON-WILLIAMS

In the event that the Court determines that it has jurisdiction over the custody of Talassa Bacon-Williams, Respondent Joan Bacon, for her Cross-Petition for custody of Talassa Bacon-Williams, states and alleges:

1. The true correct names and addresses of the parties are as follows:

Respondent:
Joan Bacon
2980 West 28th Street
Apartment 1947
Brooklyn, New York 11224

Petitioner:
Eileen Wilson
78 East Isabel Avenue
St. Paul, MN

2. The correct name and address of the child who is subject of this action is Talassa Bacon-Williams. Her present address, upon information and belief, is 1061 Hall Street, West St. Paul, Minnesota.

3. Respondent alleges that this Court lacks jurisdiction over this matter. However, if the Court determines that it does have such jurisdiction, awarding permanent legal and physical custody of Talassa Bacon-Williams to Respondent would serve the best interests of the child pursuant to Minn. Stat. §518.17, subd. 1 (1993).

4. The child's parents wish to have custody of her and the child is not of sufficient to age to have a reasonable preference as to custody.

5. Respondent and the child's father, T.J. Williams, have provided a stable home for the child along with her four siblings. The family unit, consisting of Respondent, the child's father, T.J. Williams, and their children has been permanent and stable during the child's life.

6. The child was well-adjusted to her home, school and community in Brooklyn, New York.

7. The child has lived with Respondent for much of her life.

8. Respondent has the capacity and disposition to give the child the love, affection, and guidance she needs.

9. Petitioner only gained physical custody of the child by improperly retaining her after a visit to Minnesota with her siblings.

10. The parties are represented by counsel as follows:

Petitioner:

Jeffrey L. Orren, Esq.
400 Exchange Building
26 East Exchange Street
St. Paul, MN 55101

Respondent:

Carol A. Peterson
Dorsey & Whitney
Pillsbury Center South
220 South Sixth Street
Minneapolis, MN 55402

Andrew Dwyer, Esq.
Brooklyn Legal Services Corp.
105 Court Street
Brooklyn, New York 11201

WHEREFORE, Respondent prays the Judgment and Decree of the Court granting the following relief:

1. Determining that the Minnesota District Court lacks jurisdiction over the custody of Talassa Bacon-Williams;

2. Awarding Respondent the necessary travel and other expenses she has incurred, as provided by Minn.Stat. §518A.08;

3. In the alternative, if the Minnesota District Court determines that it does have jurisdiction in this matter, finding that it would serve the best interests of Talassa Bacon-Williams to live with her mother, Respondent, pursuant to Minn.Stat. §518.17, subd. 1, as set forth above;

4. Awarding Respondent the sole legal and physical custody of Talassa Bacon-Williams; and

5. Granting such other and further relief as the Court deems just, fair and equitable in the premises.

Dated: October 13, 1993

DORSEY & WHITNEY

By /s/ Carol A. Peterson
Carol A. Peterson, (#169213)
Pillsbury Center South
220 South Sixth Street
Minneapolis, MN 55402
Telephone: (612) 340-7837

Andrew Dwyer, Esq.
Brooklyn Legal Services
105 Court Street
Brooklyn, New York 11201
(718) 237-5523

Attorneys for Respondent

(2)

FILED
AUG 18 1994
OFFICE OF THE CLERK

No. 94-130

In the
Supreme Court of the United States
October Term, 1994

IN RE THE CUSTODY OF: T.B.

JOAN BACON,

Petitioner,

v.

EILEEN WILSON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MINNESOTA COURT OF APPEALS

RESPONDENTS' JOINT BRIEF IN OPPOSITION

Neut L. Strandemo
Counsel of Record
Judith C. Nord
STRANDEMO & SHERIDAN, P.A.
2125 Upper 55th Street East
Inver Grove Heights, Minnesota 55077
(612) 455-1764

Attorneys for Respondent Child

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QUESTIONS PRESENTED

1. Under the PKPA, must a State accord full faith and credit to an *ex parte* temporary custody order issued by another State when the person with physical custody of the subject child was not provided with notice of, or an opportunity to be heard at, the temporary custody hearing?

2. Under the PKPA, when one State has "home State" jurisdiction may another State exercise "emergency" jurisdiction over the custody dispute based on the child's assertions, as stated by the child's attorney, that the child has been physically abused in the past and was recently threatened with further mistreatment or abuse?

PARTIES TO THE PROCEEDING

This proceeding involves an interstate custody dispute. While Petitioner identifies the caption for this case as "*Joan Bacon v. Eileen Wilson*," the Minnesota Court of Appeals ruled that the proper caption for this matter is "*In Re the Custody of: T.B.*" *See* Order of the Court of Appeals of the State of Minnesota in *In Re the Custody of: T.B.*, No. C7-93-2263 (Minn. Ct. App. Nov. 30, 1993), reprinted in Appendix to Petition for Writ of Certiorari [hereinafter "PA"] at 20a.

The Minnesota District Court appointed a Public Defender to represent T.B., the child who is the subject of this custody dispute, thus making the child a party to the proceeding. *See* Order of the District Court for the First Judicial District of the State of Minnesota in *In Re the Matter of the Welfare of: Talassa Bacon-Williams*, (Minn. Dist. Ct. Aug. 19, 1993), PA at 14a. Thus, the parties to the instant proceeding are the child [hereinafter "T.B."], the child's mother [hereinafter "Petitioner Bacon"], and the child's maternal grandmother [hereinafter "Respondent Wilson"].

While Respondent Wilson was represented by counsel throughout the proceedings below, she can no longer financially afford counsel and, therefore, is proceeding in this matter *pro se*. Respondent Wilson joins in this Brief in Opposition. Respondent Wilson respectfully requests that all future notices regarding this proceeding be addressed directly to her as follows:

Ms. Eileen Wilson
78 East Isabel Avenue
St. Paul, Minnesota 55107.

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No. 94-130

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

IN RE THE CUSTODY OF: T.B.

JOAN BACON,

Petitioner,

v.

EILEEN WILSON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MINNESOTA COURT OF APPEALS

RESPONDENTS' JOINT BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

Respondents, EILEEN WILSON and T.B., respectfully request that the Court deny Petitioner JOAN BACON'S Petition for Writ of Certiorari seeking review of the decision of the Minnesota Court of Appeals in this case. The Petition should be denied because the decision of the Minnesota Court of Appeals is consistent with the opinions of this Court and the decisions of other State courts of last resort.

OPINIONS BELOW

On February 22, 1994, the Minnesota Court of Appeals filed its decision affirming the trial court's dismissal of Petitioner's motion to dismiss for lack of jurisdiction. The Minnesota Supreme Court summarily denied Petitioner's Petition for Further Review on April 19, 1994. Neither courts' opinion is published. Both opinions are reproduced in the Appendix to the Petition for Writ of Certiorari at 1a-5a and 22a, respectively.

JURISDICTION

Petitioner has invoked the jurisdiction of the United States Supreme Court under 28 U.S.C. § 1257.

STATUTORY PROVISION INVOLVED

Parental Kidnapping Prevention Act of 1980, Pub. L. No. 96-611, 94 Stat. 3566, *codified at* 28 U.S.C. § 1738A.

STATEMENT OF THE CASE

A. Factual Background.

T.B., the young woman at center of this custody dispute, was born November 24, 1978, and is nearly sixteen years of age. *See* Order of the Minnesota District Court dated Nov. 1, 1993, *filed in In Re the Custody of: Talassa Bacon-Williams* [hereinafter "Order of Nov. 1, 1993"], reprinted in Appendix to Petition for Writ of Certiorari [hereinafter "PA"] at 6a-12a. Petitioner, Joan Bacon, is T.B.'s mother and is a resident of the State of New York. Respondent, Eileen Wilson, is T.B.'s maternal grandmother and is a resident of the State of Minnesota. Although T.B. has resided with her mother in New York for seven years of her life, she has resided with her grandmother in

Minnesota for the majority of her life – nearly nine years. *Id.* at 6a-7a. T.B. most recently resided in New York from mid-1990 to July 18, 1993. *Id.* at 7a. T.B. has resided in Minnesota since July 18, 1993.

During the most recent period of time in which T.B. resided in New York, she was subjected to and threatened with physical abuse by Thomas Williams, Petitioner's live-in companion.[1] Transcript of Proceeding of Aug. 18, 1993 [hereinafter "Tr. of Aug. 18, 1993"], reprinted in Appendix to Respondents' Joint Brief in Opposition [hereinafter "RA"] at 4a-5a. Petitioner admits that in 1991 she took T.B. to the hospital because of Mr. William's physical abuse. *Id.* at 11a-12a. As required under New York law, the hospital reported the suspected child abuse to the Department of Social Services. *Id.* at 12a. However, because T.B. partially recanted her story and told the social worker that she believed she may have been responsible for the abuse inflicted upon her by Mr. Williams (*Id.* at 5a, 11a), as is common with victims of abuse, that incident of physical abuse was not substantiated by the Department of Social Services. Letter from

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[1] Petitioner and Mr. Williams, whom Petitioner refers to as her "fiancee," are not married. Affidavit of Joan Bacon [hereinafter "Bacon Aff."], PA at 28a. Mr. Williams has resided with Petitioner for the past nine years, despite the fact that he is married to another woman (*Id.*) and has a fifteen-year old daughter from that marriage. *Id.* at 30a. While Petitioner alleges that Mr. Williams is T.B.'s biological father (*Id.* at 28a), Mr. Williams is not identified as T.B.'s father on her *original* birth certificate. Tr. of Aug. 18, 1993, RA at 8a-9a. Nor does his name appear as T.B.'s father on her *original* passport. *Id.* at 10a. Mr. Williams has not intervened as a party to the Minnesota custody proceeding, and is not identified as a party on any of the documents filed in New York. *See* New York Petition for Custody and New York Order Directing Temporary Custody, PA at 39a, 42a, 45a, 49a, 51a. Further, despite Petitioner's allegation that Mr. Williams has been adjudicated as T.B.'s biological father (Petition for Writ of Certiorari [hereinafter "Petition"] at p. 3, FN2), T.B., who has resided in Minnesota since July 18, 1993, has never provided a blood sample for analysis in any paternity or other proceeding in New York or elsewhere.

Sanford R. Berman, New York State Department of Social Services, to Thomas J. Williams, (Mar. 11, 1992), PA at 47a-48a.

More significant to this case is T.B.'s assertion that, approximately three weeks before coming to Minnesota to visit her grandmother, she was threatened by Mr. Williams with further mistreatment. Tr. of Aug. 18, 1993, RA at 5a, 8a. *See also* Order of the Minnesota District Court dated Aug. 19, 1993, *filed in In Re the Matter of the Welfare of: Talassa Bacon-Williams* [hereinafter "Order of Aug. 19, 1993"], PA at 14a-15a; Order of Nov. 1, 1993, PA at 7a, 11a; and, Order of the Minnesota Court of Appeals *filed in In Re the Custody of: T.B.*, (No. C7-93-2263) (Minn. Ct. App. Feb. 22, 1994) [hereinafter "Ct. App. Order"], PA at 2a, 3a. At no time during the hearing on August 18th did Petitioner or Mr. Williams ever specifically deny T.B.'s allegation that she had recently been threatened. Furthermore, no where in her Petition for Writ of Certiorari does Petitioner deny T.B.'s allegation.

On July 18, 1993, Petitioner sent T.B. and three of her siblings to Minnesota for an extended summer vacation. Bacon Aff., PA at 33a. There are conflicting statements about whether the children were to stay with their aunt or with their grandmother while in Minnesota. *See* Petition at p. 3; Tr. of Aug. 18, 1993, RA at 2a. Despite these conflicting statements, Petitioner admits that she knew the children were staying at their grandmother's home because their aunt had a friend, Lisa, staying with her at the time. Bacon Aff., PA at 34a. At that time, Petitioner never objected to the children staying with their grandmother. *Id.* It is undisputed that Respondent Wilson has had physical custody of T.B. since July 18, 1993.

While in Minnesota, T.B. informed her grandmother that she did not wish to return to New York, in part because she was afraid of the physical abuse she suffered at the hands of Mr. Williams. Tr. of Aug. 18, 1993, RA at 4a. On August 4, 1993, the date T.B. was scheduled to return to New York, T.B. telephoned Petitioner to inform her that she would not be

returning with the rest of her siblings. *Id.* at 10a. Petitioner, however, was not at home to receive T.B.'s message. *Id.* T.B. did not return to New York on August 4, 1993, along with the rest of her siblings. When T.B. did not return to New York, Petitioner and Mr. Williams drove to Minnesota to retrieve her, arriving on August 6, 1993. Bacon Aff., PA at 34a.

Petitioner's allegation that T.B. was some how secreted away from her on the advise of Respondent Wilson's attorney (Petition at p. 4) is patently denied. Tr. of Aug. 18, 1993, RA at 6a-7a. Contrary to these allegations, Petitioner admits that she knew exactly where T.B. was located in Minnesota and also admits that she had an opportunity to regain custody of her, but declined to do so. Bacon Aff., PA at 35a. T.B. was fully aware that her mother was in Minnesota, but she informed her grandmother that she did not wish to see or speak with her mother for fear that she would be forced to return to New York. Tr. of Aug. 18, 1993, RA at 11a. Unlike a child who has been "kidnapped," T.B. was not restricted from contacting her mother. Rather, T.B. could have contacted her mother at any time, had she desired to do so. On August 12, 1993, Petitioner returned to New York without T.B.

B. Procedural Background.

1. New York's *Ex Parte* Temporary Custody Order.

It is undisputed that prior to August 13, 1993, no custody proceeding had been commenced in either Minnesota or New York, and neither State had issued a custody order regarding T.B. Petition at pp. 3, 4. On August 13, 1993, Petitioner filed in New York a Petition for Custody of T.B. New York Petition for Custody, PA at 39a-41a. On that same date, Petitioner obtained an *ex parte* Temporary Custody Order from the New York court awarding her temporary custody of T.B. Order Directing

Temporary Custody, Family Court of the State of New York, County of Kings, in *Bacon v. Williams*, No. 14795/93 (N.Y. Fam. Ct. Aug. 13, 1993) [hereinafter "New York *ex parte* Temp. Custody Order"], PA at 45a-46a. The New York court scheduled a hearing for August 25, 1993. *Id.* at 46a.

The New York *ex parte* Temporary Custody Order[2] indicates that Respondent Wilson appeared at the temporary hearing in New York on August 13th. *Id.* at 45a. However, contrary to the appearances identified in that Order, Petitioner admits that Respondent Wilson was not aware of and did not appear at that hearing. Tr. of Aug. 18, 1993, RA at 5a. Thus, it is undisputed that Respondent, who then had physical custody of T.B., was neither given notice of nor an opportunity to be heard at the August 13th hearing in respect to the issuance of the New York Custody Order.

Respondent's *attorney* was given a copy of the New York Petition for Custody and the New York *ex parte* Temporary Custody Order on August 16, 1993, three days ***after*** the hearing was held and the Order was issued. *Id. at 5a-6a;* Aff. of Pers. Serv. of New York *ex parte* Temporary Custody Order, PA at 44a. However, to this date, *Respondent has **never** been **personally served** with either the New York Petition for Custody or the New York* ex parte *Temporary Custody Order.*

Throughout her Petition, Petitioner continuously refers to the custody hearing that was scheduled in New York on August 25, 1993. *See, e.g.,* Petition at pp. 4, 5-6, 9, 20. Respondent acknowledges that she received actual notice of that custody hearing. However, *the August 25th hearing is **not** the hearing that is at the center of the decision of the Minnesota Court of Appeals.* Rather, the hearing that Respondent should have

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[2] The Temporary Custody Order issued by the New York Family Court is a "form" order utilized by that court, as evidenced by the identicalness of the various Orders issued by that court. *See* PA at 45a-46a, 49a-50a, 51a-52a.

received notice of, but never did, was the August 13th custody hearing.

2. Minnesota's Assumption of Jurisdiction.

On August 16, 1993, Petitioner and Mr. Williams came to Minnesota in an attempt to enforce the New York Custody Order through local law enforcement authorities, who declined to enforce the Order. Bacon Aff., PA at 34a. On August 17, 1993, the Minnesota District Court received an *ex parte* telephone contact from Mr. Williams alleging that T.B.'s maternal grandmother had failed to return T.B. to her home in New York following her summer vacation in Minnesota. Tr. of Aug. 18, 1993, RA at 2a. Based upon this *ex parte* contact, the Minnesota District Court *sua sponte* issued an Order finding that T.B. was "in need of immediate protection or services."[3] Order of the Minnesota District Court *filed in In Re the Matter of the Welfare of: Talassa Bacon-Williams*, (Minn. Dist. Ct. Aug. 17, 1993), [hereinafter "Order of Aug. 17, 1993"], RA at 17a. The trial court awarded temporary custody of T.B. to the Dakota County, Minnesota, Community Services Department for placement in foster care and set the matter on for hearing the next day. *Id.*

On August 18, 1993, Petitioner, Respondent, and T.B., along with personnel from the County Attorney's office and the County Social Services office, appeared before Judge Thuet. Tr. of Aug. 18, 1993, RA at 1a. The Court appointed a Public Defender to represent T.B. Order of Aug. 19, 1993, PA at 14a. As Petitioner correctly states, "Petitioner and Mr. Williams

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[3] Based upon the caption and wording of this Order, it appears that the trial court considered it to be a Child in Need of Protection or Services ["CHIPS"] matter, pursuant to Minnesota Statutes section 260.01, *et. seq.* This explains the original caption for this matter, *In Re the Matter of the Welfare of: Talassa Bacon-Williams*, and also explains the trial court's *sua sponte* finding that the child was in "immediate need of protection or services." Minn. Dist. Ct. Order of Aug. 17, 1993, RA at 17a.

addressed the court extensively" at the hearing on August 18th. Petition at p. 5. Counsel for Respondent Wilson and T.B. also addressed the court. While counsel for T.B. and Respondent Wilson urged the court to speak *in camera* with the child, the court declined to do so. Tr. of Aug. 18, 1993, RA at 10a. Instead, the court indicated that T.B.'s attorney could speak for her. *Id.* at 12a. Further, the court stated:

> I suspect that what you folks are telling me is what Talassa is going to tell me, too. I will accept that what you say is true, that she doesn't want to go back to New York and she wants to stay here in the State of Minnesota, and that she is afraid of Thomas Williams.

Id. 10a. Judge Thuet also accepted as true the statements made by Petitioner and Mr. Williams. *Id.* at 3a.

The court recessed the hearing for approximately one and one-half hours in an attempt to allow the parties to resolve the matter amongst themselves. *Id.* at 12a. The parties were unable to reach an agreement, and counsel for T.B. so informed the court. *Id.* The court concluded the hearing by indicating that he needed time to "digest" all of the information he had been provided, and to properly research the issues presented. *Id.* at 12a. Specifically, the court stated:

> But, there is obviously some ties between Talassa and her grandmother here in view of the fact that her grandmother raised her for a number of years, and there are some ties between Talassa and her aunt here and her cousin who is here. You know, there is valid reasons, you know, for both sides I guess. . . . I guess I need time to digest all of this and do a little research on the law. So far I have been

> doing this kind of on my own motion in the effort to save everybody some money and grief. I haven't properly researched the law and I guess I need some time so I would like to do this. I will issue a decision and I would hope to have that decision out, I am going to say by noon tomorrow.

Id. at 12a-13a.

On August 19, 1993, Judge Thuet issued an Order finding that Minnesota could properly exercise emergency jurisdiction over the custody dispute, reasoning that "[t]he Child has alleged that she has been physically abused by Mr. Williams and that Mr. Williams has threatened further physical abuse upon her unless 'she shapes up.'" Order of Aug. 19, 1993, PA at 14a-15a. The court also found that "[b]ecause physical abuse has been exhibited in the past, the court believes that the Child's fear of future physical abuse is legitimate." *Id.* at 15a. Further, the court held that Minnesota need not accord full faith and credit to the New York *ex parte* Temporary Custody Order as it was not made consistently with the provisions of the PKPA:

> The Court appreciates that a Court Order was issued by the New York Family Court on August 13, 1993, awarding custody to the Child's mother. However, this Order was obtained *Ex Parte* and neither the child nor Eileen Wilson were notified of the hearing or able to attend. *This is not the type of Order to which the statutes [PKPA] contemplate giving "full faith and credit."*

Id. (emphasis added).

The Order permitted Respondent Wilson's counsel to serve and file a Petition for Custody of T.B. on or before August 20,

1993, and, in the interim, awarded temporary custody of T.B. to Respondent. *Id.* at 13a-14a. On August 19, 1993, Petitioner was personally served with the Notice of Entry of the Order, which Petitioner has never appealed. Notice of Entry of Order, RA at 18a. On that same date, Petitioner was also served with Respondent Wilson's Summons and Petition for Custody. Petition for Custody of Talassa Bacon, *filed in In Re the Custody of: Talassa Bacon (Wilson v. Bacon)*, (Aug. 19, 1993), PA at 62a-66a.

Approximately two months later, Petitioner served upon Respondent and T.B. a Notice of Motion and Motion to Dismiss for Lack of Jurisdiction under the PKPA. Respondent Wilson filed a Responsive Motion arguing that the issue of jurisdiction was *res judicata*, in that it had already been decided by Judge Thuet. *See* Respondent's Responsive Motion at 1, and Memorandum in Opposition to Dismissal of the Petition at 6, (Oct. 25, 1993), *filed in In Re the Custody of: T.B.*, No. FX-93-9068 (Minn. Dist. Ct.). Respondent also argued that, even if the issue was not *res judicata*, the court could properly assume emergency jurisdiction under the PKPA. *Id.*

Petitioner's motion to dismiss came on for hearing before The Honorable Richard G. Spicer, Judge of Minnesota District Court, on November 1, 1993. Tr. of Nov. 1, 1993, RA at 14a. While the court discussed on the record whether the issue of jurisdiction was *res judicata* (*Id.* at 15a-16a), the court made no findings regarding that issue in its written Order. *See* Order of Nov. 1, 1993, PA at 6a-12a. Respondents argued at the hearing that Minnesota need not accord full faith and credit to the New York *ex parte* Temporary Custody Order on the grounds that it was not issued in compliance with the provisions of the PKPA in that Respondent Wilson was not provided notice of or an opportunity to be heard at the New York temporary custody hearing.

On November 1, 1993, the court filed its Order denying Petitioner's motion to dismiss for lack of jurisdiction. Order of

Nov. 1, 1993, PA at 6a-12a. Specifically, the court concluded that "Minnesota may properly exercise jurisdiction" over this custody dispute pursuant to the terms of the PKPA. *Id.* at 7a. The court also concluded that Minnesota had emergency jurisdiction, as well as best interests jurisdiction, over the custody dispute. *Id.* Like Judge Thuet, Judge Spicer also determined that the New York Temporary Custody Order was not issued consistently with the provisions of the PKPA and held that "*the Ex Parte Order issued in the State of New York without notice to Eileen Wilson, the grandmother, is not the type of Order to which the statutes contemplate giving 'full faith and credit.'*" *Id.* at 11a-12a (emphasis added).

3. Minnesota's Appellate Court Decisions.

Petitioner appealed the lower court's Order. On February 22, 1994, the Minnesota Court of Appeals filed its decision affirming the lower court's denial of Petitioner's motion to dismiss for lack of jurisdiction. Ct. App. Order, PA at 1a-5a. The court of appeals found that the lower court did not err in exercising "emergency" jurisdiction over the custody dispute, reasoning that "the allegation of a recent specific threat [of physical abuse] supports the claim of emergency jurisdiction." *Id.* at 3a. Similarly, the court of appeals found that the lower court did not err in exercising "best interest" jurisdiction over the matter,[4] reasoning that its decision was supported by "[t]he evidence of

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[4] The court of appeals found that Minnesota's exercise of "emergency" jurisdiction was appropriate under both the PKPA, 28 U.S.C. § 1738A(c)(2)(C)(ii), and the Uniform Child Custody Jurisdiction Act [hereinafter "UCCJA"], Minn. Stat. § 518A.03, subd. 1(c)(2). Ct. App. Order, PA at 3a. The court of appeals also found that Minnesota's exercise of "best interests" jurisdiction was appropriate under the UCCJA, Minn. Stat. § 518A.03, subd. 1(b), (*Id.* at 2a-3a), but recognized that such "best interest" jurisdiction was not appropriate under the PKPA when another State is the child's "home State." *Id.* at 3a.

the child's extensive contacts with Minnesota, and her presence here in her grandmother's care." *Id.* at 2a-3a.

In addition to affirming the lower court's exercise of jurisdiction, the Minnesota Court of Appeals also affirmed the lower court's determination that the "New York *ex parte* custody determination was not made consistently with . . . the PKPA because the grandmother was not given proper notice or a reasonable opportunity to be heard." *Id.* at 3a.

On April 19, 1994, the Minnesota Supreme Court summarily denied Petitioner's Petition For Further Review. Order of the Minnesota Supreme Court *filed in In Re the Custody of: T.B.*, No. C7-93-2263 (Minn. Apr. 19, 1994), PA at 22a.

SUMMARY OF THE ARGUMENT

I. This case presents no "special and important" issue appropriate for the Court's exercise of jurisdiction. It is a custody dispute involving a young woman who is nearly sixteen years of age, her mother, and her maternal grandmother.

II. This case presents no novel question of law. Rather, it merely sets forth Petitioner's refusal to acknowledge the findings of fact, made by the trial court in its broad discretion, regarding the issue of whether the child had been abused by Petitioner's live-in companion. Factual determinations regarding whether a child has been abused, and whether the evidence is sufficient enough to constitute an "emergency," are entirely within the broad discretion of the trial court and should not be reversed unless clearly erroneous.

III. The decision of the Minnesota Court of Appeals is consistent with the decisions of other State courts of last resort with respect to the same issue.

ARGUMENTS AND AUTHORITIES

I.

REASONS FOR DENIAL OF WRIT OF CERTIORARI

This case presents no "special and important" issues appropriate for the Court's exercise of its jurisdiction. U.S. Sup. Ct. R. 10.1. Rather, it is a custody dispute involving a young woman who is nearly sixteen years of age, the young woman's mother in New York (Petitioner), and the young woman's maternal grandmother in Minnesota (Respondent).

The decision of the Minnesota Court of Appeals, affirming the trial court's denial of Petitioner's motion to dismiss for lack of jurisdiction, does not conflict with the decision of another court of last resort on the same issue. *Id.* at 10.1(b). Further, the decision of the Minnesota Court of Appeals does not depart from the accepted and usual course of judicial proceedings, nor does it sanction such a departure by the trial court, as to call for an exercise of this Court's power of supervision. *Id.* at 10.1(a).

II.

FACTUAL DETERMINATIONS REGARDING WHETHER CHILD WAS ABUSED, AND WHETHER EVIDENCE WAS SUFFICIENT ENOUGH TO CONSTITUTE AN "EMERGENCY," ARE WITHIN TRIAL COURT'S BROAD DISCRETION

This case presents no novel question of law to be decided by this Court. Rather, it merely demonstrates Petitioner's refusal to acknowledge the findings of fact made by the trial court in its broad discretion. Petitioner refuses to acknowledge the trial court's findings regarding the child's allegations that she has been abused in the past, and was recently threatened with further

mistreatment, by Petitioner's live-in companion. Petitioner also refuses to acknowledge the trial court's findings that such conduct rises to the level of an emergency.

The question of whether certain conduct rises to the level of abuse so as to constitute an emergency is not a question of law but, rather, a question of fact to be decided by the trial court. *See Schoeberlein v. Rohlfing*, 383 N.W.2d 386, 388-89 (Minn. Ct. App. 1986) (issue of whether allegations of past abuse rise to the level of an emergency is question of fact for trial court to decide in its discretion). "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Minn. R. Civ. P. 52.01. "Although a reviewing court may freely interpret the law without deference to the trial court, it is bound to accept the trial court's conclusions of law based on findings that are not clearly erroneous." *In Re the Estate of Hoffbeck*, 415 N.W.2d 447, 449 (Minn. Ct. App. 1987), *rev. denied*, Jan. 28, 1988.

In her Petition for Writ of Certiorari, as in her appeal to the Minnesota Court of Appeals,[5] Petitioner asserts that evidence of "only one" incident of past physical abuse is not sufficient enough evidence for the trial court to making a determination that an "emergency" existed. Petition at pp. 28-29. In support of her allegation, Petitioner cites *Schoeberlein* for the proposition that allegations of past conduct do not satisfy the PKPA's definition of emergency. *See id.* However, unlike the present case which involves not only documented, past physical abuse against the child, but also recent, undisputed threats of further mistreatment, *Schoeberlein* involved only *past* physical abuse.

Likewise, the other cases cited by Petitioner in support of her proposition that there simply isn't enough evidence of abuse in this case to constitute an "emergency" also fall short of that

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[5] *See* Brief of Appellant Joan Bacon (Nov. 24, 1993) *filed in In Re the Custody of: T.B.*, No. C7-93-2263 (Minn. Ct. App.) at pp. 10-11.

proposition. Rather, those cases, including *Curtis v. Curtis*, 789 P.2d 717 (Utah Ct. App. 1990), *Lundell v. Clawson*, 697 S.W.2d 836 (Tex. Ct. App. 1985), and *Marks v. Marks*, 315 S.E.2d 158 (S.C. Ct. App. 1984), all stand for the proposition that it is well within the trial court's discretion to decide what does and does not constitute abuse so as to constitute an emergency.

As a basis for exercising "emergency" jurisdiction, the PKPA provides that such jurisdiction exists if the child has been "subjected to ***or threatened*** with mistreatment or abuse." 28 U.S.C. § 1738A(c)(2)(C)(ii) (emphasis added), PA at 26a. The PKPA is silent as to how a court may come to learn of such a threat. Petitioner asserts that statements made by a child's attorney on the child's behalf may be self-serving and, thus, should be excluded from consideration by the trial court. *See* Petition at p. 29. Petitioner apparently urges this Court to adopt a new test that only sworn or written allegations of such threats should be considered by a trial court. *See id.* This test, however, is not only unworkable but, also, implausible, especially given the fact that many victims of child abuse are nonverbal infants who can "speak" *only* through their attorneys.

The fact that the allegation of the threat in the present case was uttered by T.B's attorney, as opposed to by T.B. herself, was considered by the trial court and dismissed. Specifically, the trial court stated that T.B.'s attorney could speak for her (Tr. of Aug. 18, 1993, RA at 12a), and further stated that "I suspect that what you folks are telling me is what Talassa is going to tell me, too. I will accept that what you say is true, that she doesn't want to go back to New York and she wants to stay here in the State of Minnesota, and that she is afraid of Thomas Williams." *Id.* at 10a. T.B.'s allegation that she was threatened with further mistreatment is undisputed. *See supra* at p. 4.

In the present case, the trial court found that T.B. "alleged that she had been physically abused in the past and was threatened with further mistreatment unless 'she shaped up.'" Order of Nov. 1, 1993, PA at 7a. The trial court further found that that incident

of past physical abuse, coupled with the recent specific threat of further mistreatment, created a "possible emergency situation" with "respect to the minor child's safety and protection." *Id.* The trial court's factual determinations regarding the issue of abuse were within its broad discretion. Such factual determinations should not be reversed unless clearly erroneous.

Using the "clearly erroneous" standard, the Minnesota Court of Appeals reviewed the trial court's findings regarding the issue of abuse, as well as its ultimate decision to exercise emergency jurisdiction. *See* Ct. App. Order, PA at 3a. The court of appeals found that "[a]lthough alleged incidents of physical injury are not recent, *the allegation of a recent specific threat supports the claim of emergency jurisdiction.*" *Id.* (emphasis added). The court also found that "the record supports a finding that it is necessary to protect [T.B.] from abuse." *Id.* The court of appeals ruled that the trial court's findings of fact were not clearly erroneous, and concluded that trial court "did not err in exercising emergency jurisdiction." *Id.*

The decision of the court of appeals was not in error. Further, the decision of the Minnesota Court of Appeals does not depart from the accepted and usual course of judicial proceedings, nor does it sanction such a departure by the trial court, as to call for an exercise of this Court's power of supervision.

III.

THE DECISION OF THE MINNESOTA COURT OF APPEALS IS CONSISTENT WITH THE DECISIONS OF OTHER STATE COURTS OF LAST RESORT ON THE SAME ISSUE

As Petitioner correctly asserts (*see* Petition at p. 20), the PKPA mandates that "[b]efore a child custody determination is made, reasonable notice and opportunity to be heard shall be given to the contestants." 28 U.S.C. § 1738A(e). The phrase

"custody determination" is unambiguously defined under the PKPA as:

> a judgment, decree, or *other order of a court* providing for the custody or visitation of a child, and includes permanent and temporary orders, and initial orders and modifications.

Id. at § 1738A(b)(3) (emphasis added). It is apparent from the above definition that "reasonable notice" must be given before a State makes ANY custody determination, regardless of whether such determination is made *ex parte* or not.

The PKPA also provides that a State must accord full faith and credit to the custody determination of any other State ONLY WHEN such custody determination is "made consistently with" the provisions of the PKPA. *Id.* at § 1738A(a). It is clear from the plain language of the PKPA that if "reasonable notice" is not given to the contestants prior to making a custody determination, the State's custody determination is not consistent with the terms of the PKPA. Where a State's custody determination is NOT consistent with the PKPA, other States need not accord it full faith and credit.

In the present case, Petitioner argues that because the PKPA "does not impose any particular service requirements," Petitioner Bacon was not required to provide Respondent Wilson with reasonable notice prior to the New York Family Court issuing its Temporary Custody Order on August 13, 1993. *See* Petition at 20. Rather, as discussed earlier (*see supra* at p. 7), Petitioner asserts throughout her Petition that it was sufficient for Respondent Wilson to have received notice of the August 25th custody hearing. Petitioner fails to recognize, however, that while the PKPA may not expressly define any service requirements, it mandates that "reasonable notice and opportunity to be heard" must be given with respect to ANY such custody hearing. Petitioner's argument that Respondent Wilson was not entitled to

reasonable notice regarding the August 13th hearing flies in the face of the PKPA's due process requirements.

The Minnesota Court of Appeals upheld the trial court's determination that the New York Temporary Custody Order was not made consistent with the provisions of the PKPA and, therefore, that Minnesota need not accord it full faith and credit. As such, the court of appeals upheld the due process requirements of the PKPA. In so holding, the decision of the Minnesota Court of Appeals was consistent with the rulings of this Court and of other State courts of last resort in regard to the same issue.

CONCLUSIONS AND PRAYER

This case presents no "special and important" issue appropriate for the Court's exercise of its jurisdiction. It is a custody dispute involving a nearly sixteen-year-old young woman, her mother, and her grandmother. Likewise, this case presents no novel question of law. Rather, it merely sets forth Petitioner's refusal to acknowledge the factual determinations made by the trial court in its broad discretion.

Respondents pray that the Court deny the Petition for Writ of Certiorari because the case presents no issue appropriate for the Court's review and because the lower courts' holdings were not in error.

Respectfully submitted,

Neut L. Strandemo
(Counsel of Record)
Judith C. Nord
STRANDEMO & SHERIDAN, P.A.
2125 Upper 55th Street East
Inver Grove Heights, MN 55077
(612) 455-1764

Attorneys for Respondent Child

EILEEN WILSON
78 East Isabel Avenue
St. Paul, MN 55107
(612) 224-5141

Pro Se

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF DAKOTA FIRST JUDICIAL DISTRICT

In the Matter of the Welfare of:

Talassa Bacon-Williams,

Child.

[TRANSCRIPT OF PROCEEDINGS]

The above-entitled matter came on for hearing before the Honorable William F. Thuet, one of the judges of the above-named court, at the Dakota County Judicial Center, Hastings, Minnesota, on the 18th day of August, 1993.

APPEARANCES:

JEFFREY L. ORREN, Attorney for Maternal Aunt and Grandmother.

JUDITH C. NORD, Attorney for Child.

KATHRYN PETERSON, Assistant Dakota County Attorney.

JACKIE ARNOLD, Dakota County Community Service Department.

TALASSA BACON-WILLIAMS, child.

JOAN BACON, Child's Mother.

THOMAS J. WILLIAMS, Significant other to Child's Mother.

AMANDA BROWN, Maternal Aunt.

[2]EILEEN WILSON, Maternal Grandmother.

WHEREUPON, the following proceedings were duly had of record:

THE COURT: This is the matter of the welfare of Talassa Bacon-Williams. This matter is before the Court pursuant to my Court Order dated yesterday afternoon. Perhaps we could go down the line and identify everybody.

* * * * *

[3]THE COURT: This matter was brought to my attention, and I will lay the background out on the record with what I know about this case and how it comes before me now.

Yesterday afternoon I received a telephone call from Thomas Williams who indicated that he was the father of Talassa-Bacon Williams. He indicated that he and the child's mother lived together in Brooklyn, New York. I recall they have five children and that Talassa is one of those five children. That this past summer, [4] as I recall, four of the children were sent here to Minnesota to visit with the maternal grandmother, Eileen Wilson -- three of the children. Well, I am not sure --

MS. NORD: The maternal aunt.

THE COURT: Well, I was told that, as I recall, they were to visit with the grandmother. In any event, the children were sent here to Minnesota, and as I recall it was four children sent to Minnesota for summer visitation. That three of the children were returned to Brooklyn, New York and the fourth child, Talassa, did not return. That Ms. Bacon, Mr. Williams or the two of them, then called the grandmother in Minnesota, as I remember, and told -- instructed her to place Talassa on the next available flight to New York and they refused to do this.

That Mr. Williams and Ms. Bacon then drove here to the State of Minnesota to obtain custody of the child. That the child

could not be located in the State of Minnesota. That they then returned back to Brooklyn and they obtained a Court Order from a Superior Court Judge or Supreme Court in Brooklyn, awarding them custody of the child. That they then drove back here to the State of Minnesota with the New York Court Order and went to the St. Paul Police Department and requested their assistance in obtaining the custody of the child [5] who at that point they believe was living with Eileen Wilson, the maternal grandmother. That the St. Paul Police apparently went to the home and she was not at the home. It was determined she was living with her aunt, Amanda Brown.

Amanda Brown lives in West St. Paul. They then went to the West St. Paul Police Department with the New York Court Order and the West St. Paul Police Department refused to pick the child up without a Minnesota Court Order.

That is the basic background that was relayed to me yesterday afternoon. I had not seen the New York Court Order. I had not met personally with Mr. Williams, and I did communicated with Mr. Williams. I had no reason to believe that what he was telling me was not true.

Based on those representations, and let me backtrack. I believe I asked Mr. Williams at that time if there were any outstanding Court Orders from any Court, be it Minnesota, New York or elsewhere, that awarded custody of Talassa to anyone other than themselves and he said no. Based on that representation I attempted to contact the County Attorney and I was not successful so I issued an Order which awarded custody of the child to the Dakota County Community Services [6] Department for placement last night. I directed the West St. Paul Police Department to assist in obtaining custody of the child and I scheduled the matter for a hearing at 1:30 today.

I think that basically brings us up to why wer are here today. This was done on my own motion. There has no Petition filed with the Court so I want to make a decision today on where this child should reside.

* * * * *

[9]MS. NORD: Your Honor, Talassa has lived with her grandmother, Eileen Wilson, since approximately the fourth grade. She is currently fourteen years of age. From the fourth grade up until about the seventh or eighth grade, sixth grade, she lived with her grandmother in Minnesota. She then lived with her mother back in New York for three years and came to Minnesota for a visit, she lived with her grandmother, which is where she has been for the last two weeks.

When it came time for her to go back she told her grandmother that she did not want to go back because of the physical abuse that has occurred in her home. She has told me that her mother is not married to Mr. Williams, to Thomas Williams, but that he has somehow adopted her. That is not her father and it is not her stepfather to her belief. She has discussed with me in the last fifteen minutes that I have talked with her, whic is right before court, that he has been physically abusive of her and that she is scared for her own **[10]** well-being to go back living with him. She has asked me to ask the Court to let her continue living with her grandmother until some type of custody evaluation or reunification plan can be put into effect. So, I am asking the Court for her to be allowed to continue living with her grandmother until such time as any allegation of abuse can be checked out and a custody evaluation or anything else that the Court deems appropriate can happen.

She has explained to me at a couple of occasions where she was choked and her mother brought her to the hospital. Where she was physically slapped and her mother brought her to the hospital. So, the mother is completely aware of physical abuse against this child, and I don't know if it is against all of the children or just Talassa.

* * * * *

[11]MS. NORD: Immediately prior to her coming to Minnesota to visit Talassa told me she was again abused, was threatened that if she didn't behave or act in the way she was told to act that she would again be hit. For that reason she is asking to be allowed to stay with her grandmother in Minnesota.

MR. ORREN: Your Honor, I might point out about the New York investigation. From my information, which comes from a discussion that I had with the child's mother, the investigation did find that there was no abuse, but the child who was then I believe eleven years of ago, partially recanted her story and told the worker that she might have been responsible for it. I point out to the Court that this is just so typical of a reaction of an abused victim, to blame [12] themselves for the abuse.

* * * * *

[13]MR. ORREN: Your Honor, I would attack that Order on the grounds that it recites, I believe in the first paragraph if my memory is correct, the respondent was present and before the Court. Since respondent was not out in New York, if there was someone called respondent present and before the Court it was a fraud on that Court. I don't know why that line would be there.

THE COURT: Who was there, ma'am, at that Court hearing?

JOAN BACON: I was there.

* * * * *

[14]JOAN BACON: He was also served with a Petition to –

MR. ORREN: That same New York Petition you have was handed to me, which is not proper service on Ms. Wilson.

JOAN BACON: Well, you represent her.

THE COURT: Was your client served with the Petition?

MR. ORREN: No, she wasn't, Your Honor. I was, to me, but that is –

THE COURT: When?

MR. ORREN: The day before yesterday, but that is not –

THE COURT: Well, this is an Order.

MR. ORREN: There was a Petition that went along with it also.

THOMAS WILLIAMS: A copy of the Order is with the Petition.

MR. ORREN: But, it was never served on Ms. Wilson.

THOMAS WILLIAMS: It was served on her attorney.

* * * * *

[16]MR. ORREN: There was no kidnapping involved here, Your Honor. I don't know where you come up with the term even. The child was here in the State and expressed her desire to stay. There was no legal authority ever, a police officer never came and asked Ms. Wilson where the child was and I have instructed both of my clients never to lie to a police officer if that is what would occur. There was no secreting the child, Your Honor. If you are, the way you feel is to send her back to New York then I would ask you to put her in foster care for another

day so I can bring a CHIPS proceeding myself in the proper county, Ramsey –

* * * * *

[21]MR. ORREN: Yes. I refer you to 260.1, Subdivision 2 – I am sorry, I might ask you to give us two days to file those papers. There is no allegation of any kind that the child ever suffered any abuse here in Minnesota. There are allegations on the table, and it has been admitted by the mother, that the child did suffer at least some kind of abuse, what a Minnesota Court would find to be domestic child abuse.

THE COURT: Three years ago.

MS. NORD: And immediately prior to coming to Minnesota she was threatened again.

MR. ORREN: There is no allegation [22] that she suffered any kind of abuse here in Minnesota and I just don't see how the Court could send her back to New York where there are outstanding allegations of abuse.

THE COURT: There is nothing outstanding, it has been investigated as far as I am told and it has been ended. There is no investigation.

MR. ORREN: There has been no investigation of the recent claims from three weeks ago.

THE COURT: What are the recent claims?

MR. ORREN: That she was threatened by Mr. Williams.

THE COURT: With what?

MS. NORD: Physical abuse if she didn't --

THE COURT: Didn't what?

MR. ORREN: I would ask the Court to meet with the child and determine this for yourself.

MS. NORD: He told her that if she didn't shape up, be prepared to get hurt again before the end of summer. If that is not a threat, I don't know what is.

* * * * *

[25]MR. ORREN: The child's name is not Bacon-Williams. It is not.

MS. NORD: It is just Bacon, Talassa Bacon.

MR. ORREN: This is an outright fraud on this Court in an attempt --

THOMAS WILLIAMS: Your Honor, if he would like us to produce a copy of her birth certificate --

THE COURT: Go ahead, sir.

THOMAS WILLIAMS: If he would like us to produce a copy of her birth certificate from New York that states her last name is Bacon-Williams, we can.

MS. NORD: Has there been a paternity action?

THOMAS WILLIAMS: There is one right now.

MS. NORD: Your Honor, there is an action pending right now, how could her last name be Williams now?

THOMAS WILLIAMS: It was a birth [26] certificate correction.

THE COURT: Explain that, sir.

THOMAS WILLIAMS: There was no father listed on the birth certificate. We obtained documents from the Department of Health that went before a Notary. Filled out the forms and had them notarized. We sent them into the Department. The birth certificate came back corrected. It was not until the 10th. of this month, 10th of August when this whole situation arose that we found out that the Petition for Paternity had to be established. At that time we did that and it is pending right now. Otherwise it would have been done before if we knew that it legally had to be done.

MS. NORD: Your Honor, this man is the father of three of Talassa's brothers and sisters but he is not the biological father or the stepfather at this point of Talassa or her older sister.

THOMAS WILLIAMS: Your Honor, the question of paternity at this point is not the question before the Court. If counsel for the child can tell who the mother of the child had relations with to have this child, I don't think she is an expert, she was not there.

THE COURT: What is the child's name on the birth certificate?

THOMAS WILLIAMS: Talassa [27] Bacon-Williams.

MR. ORREN: You think they would inform the child of that fact.

* * * * *

[28]MS. NORD: Your Honor, Talassa just told me that her first passport did not have the name Williams on it, her second one does. * * *

* * * * *

[30]MS. NORD: Your Honor, Talassa did call and leave a message on their answering machine that she would not be returning on that plane but they had already left for the airport or whatever by the time she left hat message telling them that she wasn't coming back. So, there was a phone call.

* * * * *

[33]MS. NORD: Your Honor, Talassa just [34] told me that if you would like to speak with her in chambers alone, if you think that is appropriate she is more than willing to do that so she can explain to you more about why she does not want to live with her mother at this point in time.

THE COURT: Is there anything you people want to say?

MR. ORREN: Your Honor, I would join in the suggestion that you speak with the child in chambers. I think it is just --

THE COURT: Well, quite frankly I don't think that is going to sway my opinion one way or the other. I suspect that what you folks are telling me is what Talassa is going to tell me, too. I will accept that what you say is true, that she is going to say that she doesn't want to go back to New York and she wants to stay here in the State of Minnesota, and that she is afraid of Thomas Williams. I assume that is what she is going to tell me.

* * * * *

[36]MR. ORREN: Your Honor, but I am sure you have been involved in cases where the abused victim has recanted the allegations against the perpetrator and then has been back in court again with subsequent abuses. This is a common pattern that befalls abuse victims, whether they be battered women or children that have been victims of sexual abuse or any kind of abuse. They blame themselves, they recant and get abused again.

THE COURT: What he says is true. That is not unusual.

* * * * *

[39]MS. NORD: Not necessarily, because the child knew where her mom was at and could have contacted her and the child did not want to do that. [40]The mom also knew that she was either at her aunt's or her grandmother. Talassa told her grandmother and her aunt that she did not want to talk with her mother because she was scared she was going to be forced to go back to New York. That is not kidnapping and that is not hiding the child away. That was the child's choice, Your Honor.

* * * * *

[43]MR. ORREN: I am not saying substantiated abuse, I am saying a verifiable incident occurred that would be considered domestic abuse, in this court at least. The child was hit by a nonrelative and had to be hospitalized. It is admitted.

THE COURT: Is that whet happened, ma'am?

JOAN BACON: Excuse me?

THE COURT: Are you admitting that Thomas hit your child?

JOAN BACON: Yes, and I took her to the hospital. She was not hospitalized for -- she was held -- people from the Child Abuse Office came and spoke to Talassa by herself, at the hospital.

MS. NORD: Your Honor, she just admitted that Thomas hit Talassa.

* * * * *

[56]THE COURT: The record should reflect that the parties have had discussions for the last, a little over an hour and a half or so. I just had an opportunity to discuss this with the attorney for the child, because I am not going to speak to the child directly and I think that Ms. Nord is the mouthpiece for the child so to speak.

* * * * *

[59]But, there is obviously some ties between Talassa and her grandmother here in view of the fact that her grandmother raised her for a number of years, and there are some ties between Talassa and her aunt here and her cousin who is here. You know, there is valid reasons, you know, for both sides I guess. She also has four brothers and sisters back in New York. I think that it is important that whatever -- whatever I do here, that she maintain ties with her family members, be it her grandmother and aunt and cousins here in Minnesota if she is going back to New York, or if she stays here in Minnesota that she maintains contact with her siblings and mother in New York. I guess I need time to digest all of this and do a little [60] research on the law. So far I have been doing this kind of on my own motion in the effort to save

everybody some money and grief. I haven't properly researched the law and I guess I need some time so I would like to do this. I will issue a decision and I would hope to have that decision out, I am going to say by noon tomorrow. I say by noon tomorrow because I don't know when my court reporter will have an opportunity to type my Order. Hopefully we will have it out by nine o'clock tomorrow morning. I want to think about this case, at least for the next couple of hours. I will make a decision on what is going to happen tonight and have it out tomorrow morning.

* * * * *

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF DAKOTA FIRST JUDICIAL DISTRICT

In Re the custody of:	)	
	)	
Talassa Bacon-Williams,	)	
	)	Court File No. FX-93-9068
	)	Appellate File C7-93-9068
Eileen Wilson,	)	
Petitioner,	)	
	)	TRANSCRIPT OF
and	)	PROCEEDINGS
Joan Bacon,	)	(Motions)
Respondent.	)	

The above-entitled matter came duly on for hearing before the Honorable Richard G. Spicer, one of the judges of the above-named Court, on the First day of November, 1993, at the Dakota County Judicial Center, City of Hastings, State of Minnesota.

APPEARANCES:

JEFFREY L. ORREN, Attorney at Law, 400 Exchange Building, 26 East Exchange Street, St. Paul, Minnesota 55101-2264, appeared on behalf of Petitioner.

CAROL A. PETERSON, Attorney at Law, Pillsbury Center South, 220 South Sixth Street, Minneapolis, Minnesota 55402, appeared on behalf of the Respondent.

JUDITH C. NORD, Attorney at Law, Inver Grove Heights Professional Building, 2125 Upper 55th Street East, Inver Grove Heights, Minnesota 55077, appeared as the attorney for said child in this matter.

* * * * *

[16]MS. PETERSON: *** I wanted to speak a little bit about the res judicata claim. Your Honor, this petition was filed after the order was issued on August 19.

[17]THE COURT: You told him to file it.

MS. PETERSON: I told him to file it, but there was no opportunity to challenge the jurisdiction of this court. The jurisdiction over that petition.

THE COURT: Well, now again, let me be the devil's advocate. Isn't that exactly what was argued on August 18; whether or not there was jurisdiction to file the petition?

MS. PETERSON: I don't think so. I don't think so, Your Honor. The transcript is full of Judge Thuet saying, "New York is where this should be. I don't have jurisdiction here." Repeatedly he says that and then this order comes out and says file a petition.

THE COURT: That's kind of Judge Thuet. Sometimes he'll say things but then when he considers them, he'll take a look at the law and see what applies.

It seems to me for whatever it is worth the issue at the time was did they have the right to file a petition, and I guess he felt they had the right to file a petition. He never really addressed whether or not there was appropriate jurisdiction, I guess.

MS. PETERSON: That's right. My client went in thinking she had an order she was going to enforce. So it was a little bit of a surprise.

[18]As to Schmidt, Your Honor, it is clear in that case at 105 that a court is to make written findings and that that is strongly suggested by the Supreme Court in this case. Although the Court went on in that particular case and held on other grounds that the jurisdiction -- exercise of jurisdiction was proper, it says in very strong language on page 105 that written findings for jurisdiction are required.

THE COURT: Again, I don't think he decided the jurisdiction issue because there were no written findings, so I don't think it's res judicata. I think that's for me to determine today, and I agree with you. If I make that determination, I would have to make written findings to comply with the two acts involved. Jeffrey, you raised your finger there.

MR. ORREN: I would say that the credit to be given to the New York decision was decided and if that was disagreed with, it should have been appealed. That was -- The last paragraph of the memorandum was, really, the basis for Judge Thuet's decision, and it's amazing how closely the words Judge Thuet used mirrored the words that were cited in Joel versus Karen M. case.

THE COURT: That's true. It's interesting. He does use that wording.

* * * * * *

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF DAKOTA FIRST JUDICIAL DISTRICT

In the matter of the welfare of:

TALASSA BACON-WILLIAMS, **ORDER**

Child.

TO: West Saint Paul Police Department; Dakota County Community Services Department; Thomas J. Williams and Joan Bacon, parents of the child above named; Amanda Brown, maternal aunt; and Eileen Wilson, maternal grandmother.

It appearing to the Court that the child above named is in need of immediate protection or services, custody of the child above named is temporarily awarded to the Dakota County Community Services Department for placement in a foster or group home pending a hearing before this Court on Wednesday, August 18, 1993, at 1:30 p.m., at the Dakota County Judicial Center, Hastings. The West Saint Paul Police Department shall assist in obtaining custody of the child who is presently located at the home of Amanda Brown, 1061 Hall Avenue, West Saint Paul.

DATED: This 17th day of August, 1993.

BY THE COURT

/S/ WILLIAM F. THUET
WILLIAM F. THUET
JUDGE

Filed: August 19, 1993.

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF DAKOTA FIRST JUDICIAL DISTRICT

In Re the Welfare of:

Talassa Bacon-Williams, NOTICE OF FILING:

Child. ORDER

TO: Joan Bacon, mother of the Child, and her attorney, wherever they may be found.

PLEASE TAKE NOTICE THAT, the attached Order was filed in the office of the Court Administrator of Dakota County on the 19th day of August, 1993.

Dated: August 19, 1993

/S/ JEFFREY L. ORREN

By: Jeffrey L. Orren
Attorney for: Eileen Wilson
Attorney Reg. No.: 177489
Address: 400 Exchange Building
26 East Exchange Street
Saint Paul, Minnesota 55101-2264
Telephone: (612) 224-1364

No. 94-130

(3)

Supreme Court, U.S.
FILED
AUG 24 1994
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JOAN BACON,

Petitioner,

—v.—

EILEEN WILSON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MINNESOTA COURT OF APPEALS

PETITIONER'S REPLY TO OPPOSITION BRIEF

CAROL A. PETERSON
Dorsey & Whitney
Pillsbury Center South
220 South Sixth Street
Minneapolis, Minnesota 55402
(612) 340-7837

JOHN C. GRAY, JR.
(*Counsel of Record*)
ANDREW DWYER
MATTHEW BRINCKERHOFF
Brooklyn Legal Services
Corp. B
105 Court Street
Brooklyn, New York 11201
(718) 237-5500

Attorneys for Petitioner

HPP

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PETITIONER'S REPLY TO OPPOSITION BRIEF[1]

Respondents' effort to cast this interstate custody dispute as a "factual" controversy raising no "important" legal issues, *see* Respondents' Joint Brief in Opposition, at 12 ("Opp. Cert."), ignores the significant conflicts in the States' interpretation of the Parental Kidnaping Prevention Act of 1980, 28 U.S.C. § 1738A ("PKPA"). In fact, Minnesota's interpretation of the PKPA in this case conflicts with twenty-three (23) other States, *see* Petition for a Writ of Certiorari, at 23-26 & nn.30-32; *id.* at 29 & n.36 (July 18, 1994) ("Cert. Pet."), and respondents cite no decision from any court to support their contrary claim. *See* Opp. Cert., at 12-13, 16-18.

Incredibly, respondents fail even to mention the PKPA's priority rule banning simultaneous custody proceedings, *see* 28 U.S.C. § 1738A(g), interpreted by Minnesota in conflict with the decisions of seventeen (17) other States. Cert. Pet., at 24-26 & nn.30-31. Apparently, respondents believe they need not address this issue if they can persuade this Court that the second question -- involving the PKPA's emergency jurisdiction -- should not be reviewed. They are mistaken. If petitioner prevails on *either* question presented, the Minnesota custody proceeding must be dismissed. Neither question's suitability for review depends on the other. So, even if respondents were correct that this Court should not review whether there was a basis for emergency jurisdiction in Minnesota, *but see infra* at 4-6, petitioner will still prevail if this Court adopts the interpretation of § 1738A(g) followed by the majority of States, and holds that the first-filed

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[1] Respondents hint something is amiss because the petition does not use the caption used in the Minnesota Court of Appeals, "*In Re Custody of T.B.*" Respondents' Joint Brief in Opposition, at ii. But "counsel is not bound by the caption used in the court below;" indeed, counsel should "[a]void such captions -- even though they may have been used in the courts below -- as *In re John Smith, Ex Parte Arthur Jones, In the Matter of William Cartwright* . . . ." Robert L. Stern et al., *Supreme Court Practice* 343, 344 (6th ed. 1986). Talassa was clearly identified as the subject of the custody dispute in the petition, *see* Petition for a Writ of Certiorari, at ii (July 18, 1994), and her attorney was properly served with three copies of the petition.

New York proceeding bars the exercise of jurisdiction in Minnesota.

As for emergency jurisdiction, 28 U.S.C. § 1738A (c)(2)(C)(ii), respondents pretend the dispute is factual, namely, whether there is "enough evidence of abuse in this case to constitute an 'emergency'." Opp. Cert., at 14. But the real issue is whether Minnesota erred in basing emergency jurisdiction solely on an *attorney's* "assertion" of abuse, with *no* supporting evidence whatsoever. On this question of *law*, the holding below conflicts with nine (9) other States. Cert. Pet., at 29 & n.36.

It is hard to imagine conflicts that would more completely undermine the PKPA's central goal of establishing uniform national jurisdictional standards and avoiding jurisdictional competition and conflict between State courts in interstate custody disputes. *See* Cert. Pet., at 15-18. Indeed, as the Department of Justice recently found, the States' conflicting interpretations of the PKPA are at the heart of a national epidemic of child abductions by family members. *See* Linda K. Girdner, Ph.D. & Patricia M. Hoff, Esq., U.S. Dep't of Justice, *Obstacles to the Recovery and Return of Parentally Abducted Children: Research Summary* 6-7 (1994), *discussed infra* at 6-8. Thus, this case presents federal questions of national significance in an area of law badly in need of this Court's authoritative voice.

I. RESPONDENTS IGNORE THE CONFLICTS IN THE STATES' INTERPRETATION OF THE PKPA RAISED BY THE DECISION BELOW.

The decision below presents the States' conflicting interpretations of the PKPA in stark relief. Twenty-three (23) States conflict with Minnesota on one or both of the questions presented in the petition, while only three States support Minnesota's holding on either point. Cert. Pet., at 23-26 & nn. 30-32; *id.* at 29 & n.36. Respondents would wish this problem away, insisting that the decision below "does not conflict with the decision of another court of last resort on the same issue." Opp. Cert., at 13; *see also id.* at 1, 12, 16, 18. But respondents give

no answer to the many conflicting decisions cited in the petition nor offer a single authority to support their argument. *See, e.g., id.* at 16-18.[2] The States' conflicting interpretations of the PKPA are real, long-standing and will not disappear.

A. Respondents Do Not Even Mention § 1738A(g)'s Ban On Simultaneous Interstate Custody Proceedings.

Respondents ignore the PKPA's prohibition of simultaneous interstate custody proceedings. 28 U.S.C. § 1738A(g). Although comprising the bulk of the petition, which cites authorities from seventeen (17) States in conflict with Minnesota's decision below on this point, Cert. Pet., at 24-26 & nn.30-31, respondents do not mention it at all.

To distract attention from their silence on § 1738A(g), respondents instead contend that New York's *ex parte* temporary custody order of August 13, 1993, should not be entitled to full faith and credit. *See* Opp. Cert., at i, 17-18. But this issue is not before the Court.[3] Petitioner never sought full faith and credit for the New York order in her motion to dismiss in the trial court, she never raised this issue in her appeals below, and she does not raise this question in her petition to this Court. Nor did the Minnesota Court of Appeals decide or even mention this question, contrary to respondents' belief. *Compare* Opp. Cert., at 18 *with* Cert. Pet. App., at 3a-4a.

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[2] Respondents say the decision below "is consistent with the opinions of this Court," Opp. Cert., at 1, but this Court has never interpreted the PKPA, other than to hold that it creates no federal cause of action. *See Thompson v. Thompson*, 484 U.S. 174 (1988).

[3] Although an *ex parte* custody order may not always be entitled to interstate enforcement, its issuance does not forfeit jurisdiction nor allow another State to exercise jurisdiction in a simultaneous proceeding. *See* Cert. Pet., at 23-25 & nn. 29-30.

B. The Conflict Over The PKPA's Emergency Jurisdiction Is Not How Much Evidence Of Abuse Is Necessary To Support The Exercise Of Jurisdiction, But Whether Emergency Jurisdiction Can Exist Without Any Evidence Of Abuse At All.

Respondents' analysis of the PKPA's emergency jurisdiction provision works a major distortion of the question presented.[4] The issue is *not* whether "certain conduct rises to the level of abuse so as to constitute an emergency," *nor* whether an incident of abuse is "sufficient . . . evidence for the trial court to . . . determin[e] that an 'emergency' existed," *nor* whether there is "enough evidence of abuse in this case to constitute an 'emergency'." Opp. Cert., at 14. Rather, the issue is whether a State has emergency jurisdiction under the PKPA when there is *no evidence* of abuse. *See id.* at i; Cert. Pet., at 28-29 & n.36.

Relying on one incident of physical injury to Talassa, respondents claim she was "abused in the past." Opp. Cert., at 13. But even leaving aside the undisputed fact that the New York State Social Services Department investigated this incident and found *no abuse had occurred*, Cert. Pet. App., at 35a-36a, 47a-48a, 56a, 59a, respondents concede that *past* conduct (here an incident which occurred *two years* before the Minnesota case began) cannot support the exercise of "emergency" jurisdiction. Opp. Cert., at 14; *see also* Cert. Pet., at 27-29. As respondents acknowledge, the decision to sustain emergency jurisdiction here hinges on "the allegation of a recent specific threat." Opp. Cert., at 11, 14, 16; *see also* Cert. Pet. App., at 3a.

But there is no evidence of such a threat. Respondents talk of Talassa's "allegation" of abuse, *see* Opp. Cert., at 13, 15, but Talassa has never made any statement -- written or oral, sworn or unsworn, on the record or *in camera* -- at any point in this

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[4] Respondents admit emergency jurisdiction is the only basis for Minnesota's jurisdiction under the PKPA. Opp. Cert., at 11 n.4.

entire proceeding. *See* Cert. Pet., at 2 n.1, 5, 10 n.8.[5] Rather, as respondents concede, the only source for this claim of threatened abuse is an *attorney's* assertion at oral argument, Opp. Cert., at 15, made without support in the evidentiary record.[6]

Petitioner does not believe "that only sworn or written allegations" of abuse should be considered by a trial court. Opp. Cert., at 15. But petitioner does contend that when an assertion of emergency jurisdiction is challenged, the party asserting jurisdiction must come forward with some evidence. The "arguments or other remarks of the attorneys are not evidence," 4 David Herr & Roger Haydock, *Minnesota Practice* 9 (1986), and no factual assertion by counsel can be considered when it does not otherwise have support in the evidentiary record. *See Parkside Mobile Estates v. Lee*, 270 N.W.2d 758, 763 (Minn. 1978) (rejecting assertion argued by counsel that "had no support in the evidence"); *Ellwein v. Holmes*, 68 N.W.2d 220, 222 (Minn. 1955) (reversing verdict and granting new trial due to closing remarks by counsel where "there was no evidence to justify the remarks made").[7]

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[5] That Judge Thuet was uninterested in meeting with Talassa *in camera*, Opp. Cert., at 8, 15, does not explain why respondents did not submit a statement from Talassa (or any other evidence) in response to petitioner's motion to dismiss.

[6] Respondents' claim that "T.B.'s allegation that she was threatened with further mistreatment is undisputed," Opp. Cert., at 15, is doubly wrong. First, Talassa never made *any* allegations of abuse. Second, throughout this case, whenever respondents' *attorneys* have claimed abuse, petitioner has disputed those assertions. *See, e.g.*, Cert. Pet., at 6-7, 9-13, 29; Cert. Pet. App., at 35a, 56a, 58a; Transcript of Proceedings, at 23 (Aug. 18, 1993), in *In the Matter of the Welfare of: Talassa Bacon-Williams* (Minn. Dist. Ct.); *see also* Affidavit of Joan Bacon in Support of Petition for Custody, ¶¶ 2-6 (Sept. 20, 1993), *filed in Bacon v. Wilson*, No. V14795/93 (N.Y. Fam. Ct.).

[7] Respondents contend that Talassa's attorney was properly allowed to (continued...)

Petitioner's challenge to Minnesota's exercise of emergency jurisdiction presents not a question of fact, but a pure question of law: Can a court assert emergency jurisdiction under the PKPA in the absence of any evidence of actual or threatened abuse? On this question of law,[8] the holding below conflicts with nine (9) other States. Cert. Pet., at 29 & n.36.

II. THE STATE COURTS BADLY NEED THIS COURT'S INTERVENTION TO RESOLVE THE CONFLICTING INTERPRETATIONS OF THE PKPA.

The Department of Justice recently found that due in part to conflicting legal interpretations of the PKPA, a widespread problem of child abduction persists in the United States. "An estimated 354,100 children were abducted by parents or family members in the United States in 1988 . . . . The abductors of an estimated 163,200 children, or nearly one-half of all the abducted children, took the children across State lines, concealed them, or prevented contact." Linda K. Girdner, Ph.D. & Patricia M. Hoff, Esq., U.S. Dep't of Justice, *Obstacles to the Recovery and Return of Parentally Abducted Children: Research Summary* 1 (1994) (footnote omitted) ("DOJ Study").

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[7] (...continued)
"speak for" Talassa concerning allegations of child abuse. Opp. Cert., at 15. Minnesota law, however, specifically provides that a person may testify to a child's out-of-court statements of abuse *only if* (a) the child is less than ten years old; (b) *after a hearing* the court finds there are sufficient indicia of reliability; (c) the child either testifies or is unavailable as a witness *and* there is other corroborative evidence; and (d) any adverse party is given notice of the statement "sufficiently in advance of the proceeding." Minn. Stat. Ann. §595.02(3); *see also* Minn. Stat. Ann. § 260.156. These circumstances do not apply here.

[8] Respondents' contentions concerning the trial court's discretion to decide issues of fact are beside the point, *see* Opp. Cert., at 14-16, because questions of law are reviewed *de novo*. *See, e.g., Frost-Benco Electric Ass'n v. Minnesota Public Utilities Comm'n*, 358 N.W.2d 639, 642 (Minn. 1984).

Although the PKPA provides a response to this problem by establishing uniform national jurisdictional standards for interstate custody disputes, *see* Cert. Pet., at 15-18; Cert. Pet. App., at 24a, "many appellate judges are unaware or improperly informed of the PKPA in cases in which it should have been applied. In a nationwide sample, half the judges surveyed reported that counsel rarely, if ever, informed them of the PKPA in cases in which it was applicable. Over 40 percent of the responding attorneys said that judges were unfamiliar with the PKPA . . . ." DOJ Study, at 15. *See also* Cert. Pet., at 18 n.21.

Compounding this problem and presenting "major obstacles" to the recovery of abducted children, DOJ Study, at 5, the DOJ Study found that "*inconsistency in court interpretations of this Federal statute contribute to the occurrence of simultaneous proceedings* and issuance of conflicting custody orders." *Id.* at 7 (emphasis added). *See* Cert. Pet., at 23-26 & nn.30-31; *id.* at 29 & n.36 (citing conflicts). For example, the DOJ Study noted that "courts have varied as to whether emergency ex parte orders should be enforceable in another State." *Id.* Similarly, "[l]ack of clarity and specificity in the emergency jurisdiction provision of the PKPA, *and varied court interpretations of it*, compound problems of simultaneous proceedings and the enforceability of child custody orders." *Id.* (emphasis added).

Contrary to respondents' claim that this case involves a factual dispute affecting only the individual litigants and raising no important questions of law, Opp. Cert., at 12, the DOJ Study demonstrates that the conflicting legal interpretations of the PKPA raised by the petition contribute significantly to the national epidemic of child abduction by family members.[9] This

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[9] By repeatedly overstating Talassa's age as sixteen, *see* Opp. Cert., at 2, 12, 13, 19 (Talassa was fourteen when this proceeding began a year ago, *see* Cert. Pet. App., at 14a), respondents apparently suggest this factor renders immaterial any concern with the problems that motivated passage of the PKPA. But the PKPA specifically applies to any "'child' (continued...)

area of the law cries out for the Court's authoritative voice.

III. RESPONDENTS' "FACTS" BEAR LITTLE RELATION TO THE EVIDENTIARY RECORD.

To escape this conclusion, respondents obfuscate. In the face of a clear evidentiary record that squarely raises the legal questions presented, respondents throw up a cloud of "facts" to persuade this Court that the case is hopelessly mired in factual controversy. Upon examination, however, respondents' "facts" bear little relation to the evidentiary record. They largely consist of *attorneys'* statements made during oral argument masquerading as "evidence," or of outright misstatements. The conflicting interpretations of the PKPA presented by this case are real; the factual disputes are not.

Respondents do not deny the evidentiary record in the trial court below is comprised of the Transcript of Proceedings held on August 18, 1993 and the affidavit of Joan Bacon. Cert. Pet. App., at 28a-52a, 53a-61a. *See* Cert. Pet., at 2 n.1, 5, 10 n.8. Having offered *no* evidence in the trial court to support their position -- not even a conclusory statement by Talassa or Eileen Wilson -- respondents now try two paths to circumvent this problem.

First, respondents make assertions which have no basis in the evidentiary record, by relying on statements made by their *attorneys* during oral argument. Respondents bootstrap their attorneys' assertions, made without evidentiary support in the first instance, by repeating those same assertions in their brief to this Court, and citing the attorneys' original, unsupported assertions as the purported "record" to support these claims.

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[9] (...continued)

. . . under the age of eighteen," 28 U.S.C. § 1738A(b)(1), indicating Congress does not share the view that teenagers should be abandoned to manipulative abductions by their adult relatives.

For example, in his oral argument before Judge Thuet, respondent Wilson's attorney, Jeffrey Orren, asserted that the New York State Department of Social Services found no abuse had occurred in the one incident of physical injury to Talassa, only because Talassa had "recanted" prior allegations of abuse. But respondents have never offered a scintilla of evidence -- not even a statement by Talassa herself -- that Talassa ever made any allegations of abuse ("recanted" or otherwise), or that the New York investigation was incomplete or inadequate in any way. In her sworn affidavit to the trial court, petitioner flatly denied Mr. Orren's assertion, stating "Talassa did not 'recant' her allegations of abuse quite simply because there was nothing to recant." Cert. Pet. App., at 36a; *see also* Cert. Pet., at 6 n.5. But respondents still repeat this claim in their brief to this Court, citing as their record support nothing other than Mr. Orren's original, unsupported assertions made during oral argument. *Compare* Opp. Cert., at 3 (citing Opp. Cert. App., at 5a, 11a) *with* Opp. Cert. App., at 5a, 11a (statements by Mr. Orren).[10] Respondents repeatedly use this technique to concoct "facts" which have no evidentiary support.[11]

Alternatively, sometimes respondents simply misstate the record. For example, respondents deny that respondent Wilson and her attorney hid Talassa from petitioner when the latter first came to retrieve her daughter in Minnesota. *See* Cert. Pet. App., at 34a-35a, 58a-59a. Instead, respondents claim, "Petitioner admits that she knew exactly where T.B. was located." Opp. Cert., at 5. But respondents' citation to petitioner's affidavit does not concern petitioner's first trip to

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[10] The Department of Social Services letter cited by respondents, *see* Opp. Cert., at 3-4, merely recites the agency's conclusion that no abuse had occurred. Cert. Pet. App., at 47a-48a.

[11] *E.g.*, *compare* Opp. Cert., at 4 (*Talassa* asserted she was threatened with abuse) (citing Opp. Cert. App., at 5a, 8a) *with* Opp. Cert. App., at 5a, 8a (statements by Ms. Nord); *compare* Opp. Cert., at 4 (*Talassa* stated she was afraid of physical abuse) (citing Opp. Cert. App., at 4a) *with* Opp. Cert. App., at 4a (statement by Ms. Nord).

Minnesota, when Talassa indisputably was hidden from petitioner, *see* Cert. Pet. App., 58a, but instead refers to petitioner's second trip to Minnesota, after she obtained a temporary custody order from the New York court. Cert. Pet. App., at 35a. This is not the only instance of respondents' apparent attempt to mislead this Court.[12]

None of respondents "facts" affect the reviewability of the questions presented.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

CAROL A. PETERSON
Dorsey & Whitney
Pillsbury Center South
220 South Sixth Street
Minneapolis, MN 55402
(612) 340-7837

JOHN C. GRAY, JR.
(Counsel of Record)
ANDREW DWYER
MATTHEW BRINCKERHOFF
Brooklyn Legal Services
Corp. B
105 Court Street
Brooklyn, NY 11201
(718) 237-5500

Dated: August 23, 1994

Attorneys for Petitioner

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[12] *E.g.*, *compare* Opp. Cert., at 2-3 (claiming Talassa has lived in Minnesota for nine years) *with* Cert. Pet. App., at 29a-33a (even including the year since her abduction, Talassa has lived in Minnesota for less than eight years); *compare* Opp. Cert., at 9 (claiming Judge Thuet held that the New York custody order "was not made consistently with the *provisions of the PKPA*") (emphasis added) *with* Cert. Pet. App., at 13a-15a (no mention of PKPA).